Disclosure in Litigation: Does Mandatory Disclosure for Insurance Necessitate Mandatory Disclosure for Third-Party Litigation Funding?

Alan Litman

Introduction

Third-party litigation funding ("TPLF") involves third parties providing capital to claimholders and plaintiffs to fund litigation, and its use has exploded in recent years. In 2000, litigation funding was considered a "black swan event."[1] As of 2022, litigation funders hold $13.5 billion in assets under management.[2] The rise in TPLF providers has inevitably led to a debate over how such funding is regulated and the role these providers play in litigation, as well as raising concerns over usury, maintenance, champerty, and professional ethics. This paper focuses specifically on concerns over disclosure. Right now, parties are not required to disclose – to the judge or to their opponent – the source or the details of any third-party funding.

On the side of mandatory disclosure, organizations such as the U.S. Chamber Institute for Legal Reform have argued that TPLF disclosure should be required.[3] An often-repeated argument in favor of disclosure is that because FRCP 26 mandates that the defendant disclose the existence of liability insurance, plaintiffs should be required to disclose third-party funding because liability insurance is essentially the same idea – a third-party is paying for your legal costs and fees. While this comparison is tossed around rather often, no one has yet drilled down on why the Federal Rules were amended to require insurance disclosure, and whether those same

[1] Charles Agee & Gretchen Lowe, Litigation Finance Buyer's Guide, **Westfleet Advisors** (Jan. 30, 2020), https://www.westfleetadvisors.com/wp-content/uploads/2021/12/Westfleet_Buyers_Guide_2020-01-30.pdf.
[2] The Westfleet Insider: 2022 Litigation Finance Market Report, **Westfleet Advisors** (2022), https://www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf.
[3] See Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. Courts at 22 (Jun. 1, 2017).

underlying reasons weigh in favor of requiring financing disclosure. This paper attempts to fill that gap.

This paper will proceed as follows. Part One will detail the emergence of litigation funding, how it is typically structured, and the opposition that has emerged to it. Part Two will examine the origins of the insurance disclosure requirement in Federal Rule 26(a)(1)(A)(iv) and analyze the concerns from the drafters of the Rule as well as courts at that time that motivated the amendment. Part Three will analyze whether the concerns that led to the insurance disclosure requirement hold any weight when applied to litigation funding and if so, whether they can be reasonably implemented. Lastly, Part Four will suggest possible solutions that target the benefits of disclosure identified in the insurance context while avoiding the downsides that might appear in the funding context. Ultimately, this paper concludes that the comparison to insurance disclosure is largely inapt due to the different purposes insurance and litigation funding serve. While there may be scenarios where the policy reasons behind the insurance disclosure requirement suggest analogous disclosure in the funding context is warranted, they would be difficult to implement because disclosure can be highly prejudicial to the plaintiff.

I. Litigation Finance: What is it and What is the Case for Disclosure?

Litigation financing or funding involves third-parties providing non-recourse "loans" to either claimholders or law firms in return for a percentage of money recovered from a claim.[4] Funding is typically provided by profit-driven third-parties and directed at cases that these third-parties view as likely to generate damages or proceeds in excess of the funding.[5] Funders look at

[4] Suneal Bedi & William Marra, The Shadows of Litigation Finance, **74 Vand. L. Rev.** 563, 565 (2021).
[5] Id. at 570-71. Note however, that public interest and pro bono lawyering can also be viewed as litigation funding, even though profit is not the driving motivation. See e.g., See e.g., Andrew Ross Sorkin, Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker, **New York Times**, May 15, 2015; NAACP v. Button; 371 U.S. 415, 428 (1963) (allowing third-part funding of public interest litigation.).

legal claims like investors look at any other type of asset – something of value that someone, somewhere, is legally entitled to and which, upon some form of monetary investment, can generate returns in excess of that initial investment. Unlike most other assets, however, legal claims must be litigated in order to give rise to enforceable judgments. This is often very expensive, prohibitively so for many people and businesses.[6] This is where litigation funders come in. For those who have a meritorious claim but are unable to afford litigation costs, funders can provide the necessary capital in exchange for a cut of any payout. But the funding is not traditionally structured as a typical loan -- it is usually non-recourse -- meaning that the litigant is only obligated to pay the funder if the claim is successful.[7] If the claimholder loses, the funder gets nothing. Litigation financing is typically broken down into two buckets – consumer funding and commercial funding.[8] Both have a unique structure and strategy, and funding firms typically specialize in one or the other.

II. Comparing Insurance Disclosure to Funding Disclosure: Is There a Case?

Advocates on both sides of the disclosure argument have debated whether defendant-side insurance disclosure necessitates plaintiff-side funding disclosure. What those same advocates have not done in-depth, is look deeper into the policy reasons behind insurance disclosure or consider that the disclosure concerns might have different force in the consumer and commercial context. This paper will next address several of the insurance disclosure arguments that are the

[6] See Hamilton Cap. VII, LLC v. Khorrami, LLP, 2015 WL 4920281 at *5 (N.Y. Sup. Ct. 2015) ("Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her of his case."). See also Lake Whillans, A Financial Perspective on Commercial Litigation Finance, (explaining why litigation financing can make litigation more accessible for certain businesses).
[7] See Bedi & Marra, supra note 4 at 574 ("Virtually all litigation finance transaction are 'nonrecouse,' meaning the funder's return is secured only from the return of the funded cases. If the case fails, the funder recovers nothing."). There are also occasionally investments that do require recourse, but these are often outliers.
[8] Anthony J. Sebok,, 56 **Wm. & Mary L. Rev.** 883 (2015).

least applicable to the funding disclosure analog. Then, it will consider which argument may be persuasive both in the consumer and commercial funding context.

A. The Low-Hanging Fruit

Many of the policy concerns are easy to dispel at the outset for the obvious reason that litigation funding and liability insurance exist for two very different reasons, even if both "fund" litigation in the literal sense.

Liability insurance policies exist solely to satisfy any liability for which it covers.[9] There are two paradigms through which we can view the purpose of liability insurance – plaintiff compensation and defendant protection.[10] The former looks at liability insurance as existing for the sake of plaintiffs who were injured by the insured defendant and the latter looks at liability insurance as protecting the defendant's assets from a judgment against them. Several of the policy reasons for insurance disclosure make sense only based on the plaintiff-compensation rationale. The statutory and contractual bases, for example, make sense if liability insurance is thought of as owed to and for the benefit of the plaintiff.[11] Fraudulent settlement based on misrepresentation of assets is also only an issue because the plaintiff is owed some form of compensation.[12]

This plaintiff-compensation rationale for liability insurance has no analog in the litigation funding context, which functions only for the benefit of the party who contracted for it. The other party -– the one usually seeking disclosure -- derives no benefit from the existence of that contract. Rather, the defendant is explicitly adverse to the funding agreement, which exists

[9] **Fed. R. Civ. P.** 26(a)(1)(A)(iv) advisory committee's note to 1970 amendment.
[10] Class Notes from Litigation Finance Seminar (Apr. 3, 2023).
[11] See supra section II(E) (detailing the contractual and statutory bases for disclosure).
[12] See infra section II(G). There may be an argument that can be made in support of funding disclosure that adheres to this rationale, discussed infra Section III(C)(2).

solely to help the plaintiff seek compensation from the defendant.[13] For this reason, the insurance disclosure rationales mentioned in the preceding paragraph are inapplicable. Nothing is owed to the defendant and the defendant can never recover any of these funds. This also obviates any agency problems akin to the one liability insurance disclosure contemplated.[14] Again, the defendant derives no benefit from the funding agreement, so there is no reason for disclosure based on any benefits the defendant derives from the existence of the agreement.

However, there is perhaps one scenario where funders may exert too much control over the litigation such that they can be liable to pay the defendant's attorney's fees, costs, or sanctions. In Abu-Ghazaleh v. Chaul, Plaintiffs brought a case for civil theft and conspiracy to commit civil theft against Defendants over the sale of Mexican subsidiary companies.[15] Plaintiffs received substantial funding from two outside parties, who also "approved the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreement."[16] Given this involvement and level of control, the court ruled that the outside funders were parties to the litigation and thus were liable for paying costs and fees to the defendants.[17]

In such a scenario as above, it may be necessary for the defendant to inquire into the funding agreement or solvency of the funder and might make funding agreement relevant and thus discoverable. But these situations are very rare, particularly as most large funders carefully

[13] Cf. Baker, supra note 49 (discussing various alignments and conflicts of interest that can arise in the insurance context.).
[14] See infra II(F). Litigation funding does create numerous other agency problems, for which funders, litigants, and lawyers structure agreements to align incentives to the highest extent possible.
[15] 36 So. 3d 691, 692-93 (Fla. Dist. Ct. App. 2009)
[16] Id. at 693.
[17] Id. at 692-95.

structure their agreements to avoid controlling the litigation. The holding of Abu-Ghazaleh has also been limited, and several Florida courts have distinguished it in subsequent disputes.[18]

Similar slippery slope arguments have been raised by funders in reaction to disclosure proposals concerning funder work-product and internal communications that may be discoverable if funding details are similarly made discoverable.[19] The comparison to insurance disclosure is not perfect here. With insurance, the "slippery slope" was always illusory because insurance was so different from other assets held by the defendant that drawing a bright line was easy and intuitive -- insurance is an asset held specifically to satisfy liability in the claim at issue and every other asset held by the defendant is not. Things are not as easy with funding disclosure. If the basis for disclosure is that the details can be more conducive to settlement and case appraisal, then that same logic also applies to work product discovery in that knowing what the funder thinks about each case can lead to efficient case disposition for the same reasons that funding disclosure would. At the same time, just because the slope is slipperier with funding disclosure does not make a solution untenable – courts or the rules committee can always decide where to draw the line, even if it is arbitrary. Here, for example, a rule could be implemented that allows for disclosure of funding and funding agreements but specifies that other funder work-product and internal communications are not discoverable.

B. Consumer Litigation Funding

1. Settlement

[18] See e.g., Miccosukee Tribe of Indians of South Florida v. Bermudez, 145 So. 3d. 157, 159-61 (Fla. Dist. Ct. App. 2014)(choosing not to follow holding of Abu-Ghazaleh over public policy concerns that it would chill otherwise normal conduct of supporting litigation and legal fees); Miller UK Ltd. v. Caterpillar, 17 F. Supp. 3d 711, 722 (N.D. Ill. 2006) (finding that the amount of control exercised by the funders in Abu-Ghazaleh was unique and not applicable to the case at issue).

[19] Notes from Litigation Finance Seminar (Apr. 10, 2023).

The strongest argument in favor of disclosure in the consumer context is that disclosure will encourage easier settlement and disposal of litigation. Frequently, this type of litigation involves thinly capitalized plaintiffs against well capitalized defendants.[20] In such situations, defendants frequently resort to a strategy of "burying" the plaintiff in motions, attempting to draw out the litigation and make it prohibitively expensive to pursue.[21] By disclosing the presence of funding, defendants can be deterred from pursuing this strategy and instead can make reasonable settlement offers.

But there are also reasons to think that the effects of disclosure in the settlement context are overblown or can even have the opposite effect of dragging out litigation. First, if disclosure is likely to deter defendants from pursuing a foot-dragging strategy, then plaintiffs have every incentive to disclose voluntarily, regardless of requirements imposed on them. Second, defendants are likely to not look too kindly on funding firms and the trouble they cause defendants. Given this, it is reasonable that they would adopt a strategy of zealously litigating any case backed by a funder in order to deter funders in the future and show that the presence of a funder will not mean an easy settlement. Lastly, disclosure may create an adverse effect on parties that do not have funding. Funder support typically signals that the funder views the plaintiff's case as meritorious and likely to pay out. The absence of funding may conversely signal to the defendant that the plaintiff's case is weak, and lead to further burying in paperwork and motions.

2. Appraisal of Case

[20] Sebok and Avraham, supra note 13 at 1135.
[21] See Hamilton Cap. VII, LLC v. Khorrami, LLP, 2015 WL 4920281 at *5 (N.Y. Sup. Ct. 2015) ("Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her of his case.").

It is difficult to think of any case for appraisal outside of the settlement context. With insurance, the idea is that the policy is usually the biggest source of recovery for the plaintiff, so disclosure of the policy is equivalent to knowing what the claim is worth. Not so with funding, which primarily tells the defendant how well-resourced the plaintiff is. Aspirationally, this should make no difference as defendants should litigate according to the merits of the claim. But it is no secret that this is usually not the case, with defendants frequently adjusting their litigation strategy according to how capable the plaintiff is of maintaining their claim. One counterargument is that, similarly to how an insurance policy tells litigants the maximum value of a claim, a funding agreement shows the minimum value because a funder would expect a return over their investment and the amount funding is often congruous to the expected value. But the analogy is imperfect here. In the insurance context, disclosure allows for appraisal because it tells the plaintiff what they can easily collect if they win. With funding, the defendant is already in the best position to assess the merits of the case and estimate what the damages may be; getting a funder's view does not add very much, especially considering the funder is more removed from the crucial facts.

C. Commercial Funding

As discussed earlier,[22] commercial funding differs from consumer funding in several important respects that ensnare different disclosure concerns. One is that the claimholder is not always "cashed-out" in the same way the consumer claimholder might be. The provided funding typically goes towards paying legal fees and, in some cases, providing the claimholder with working capital.[23] But the claimholder retains a strong interest in ensuring a favorable outcome

[22] See infra I(B).
[23] Bedi & Marra, supra note 4 at 572-73. There are some instances in the commercial context where the claimholders may have monetized the claim similar a consumer context, such as Sysco in the Burford v. Sysco saga, see supra Section III(C)(2).

in the litigation as there should be sufficient upside for the claimholder if the funding agreement is properly structured.[24]

There are two scenarios in commercial litigation funding where disclosure might contribute to efficient case resolution either through settlement or better case appraisal. The first is what this paper calls the "subordination" scenario. This is where the plaintiff, who has complete control of the litigation and is the real party in interest, nonetheless has skewed incentives because their claim to case proceeds are subordinate to other parties who have no control of the litigation. The second is what this paper calls the "control" scenario. Here, the plaintiff may or may not have a subordinated recovery but has given up certain decision making control to the funder or another party.

1. Subordination Scenario

As a part of the typical funding arrangement, the plaintiff splits the recovery with the funder and their lawyers. They also typically agree to an order in which the proceeds are paid out -- referred to as a waterfall agreement. Because the funders are putting up money on a non-recourse basis, funders typically protect their investment by negotiating a waterfall agreement that gives them preferred recovery of up to a certain amount of their initial investment, at which point the money "flows down" the waterfall to other parties. As Joanna Shepard and Jude Stone explain, "this 'first money out policy' disproportionately front-loads the financier's expected fraction of payment in the case both to discourage the client from settling for too little as well as to ensure the business plaintiff retains some incentive to maximize the total recovery."[25] When the judgment or settlement is large, waterfalls are somewhat useless as every interested party can

[24] In fact, this is a priority for most funders, who structure agreements to avoid a case where the claimholder does not have sufficient upside to zealously pursue the claim and hold out for the highest settlement possible.
[25] Joanna M. Shepard & Judd E. Stone II, Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance, 47 **Ariz. St. L.J.** 919, 941-42 (2015).

recover their due without any conflict among them. But waterfalls are crucial when recoveries are smaller as they will dictate who recovers money and who gets nothing.

A restrictive waterfall agreement will itself make settlement harder than would be the case in the absence of one because the claimholder will both have full discretion over settlement while also being in the back of the line of parties getting paid. To funders, this mixture is a feature rather than a bug – it is a negotiating tool that effectively ensures that claimholders will not take a low settlement, serving as a loophole to funders' typical lack of direct control over litigation and settlement. Because these waterfalls can strongly guide settlement incentives, there is an argument that disclosure can encourage settlement because it allows the defendant to understand what incentives the plaintiff has in accepting any given offer.

Consider a world in which disclosure is not required and the claimholder and funder, for their own reasons, do not want the defendant to disclose the presence of funding or any aspect of the funding agreement.[26] In this case, the litigation may be unnecessarily drawn out while the defendant makes offers that the claimholder cannot accept because they would not be receiving any compensation due to the waterfall agreement. If the defendant understands the plaintiff's incentives to settle, they can adjust their strategy accordingly by presenting more acceptable offers and cutting out the time that would be spent proposing useless offers.[27] This also tracks the insurance analog. In the absence of insurance disclosure, insurers may reject settlements above the policy limit, with the important caveat that insurers have a duty to settle if a trial may

[26] An argument can also be made that the claimholder and funder have every incentive to disclose so as not to draw out the litigation and spend more on legal fees than necessary.

[27] As courts noted when the liability disclosure raged, disclosure essentially gives the non-funded party a potentially "unfair" peek into the funded parties litigation strategy and settlement incentives. However, courts found that this disadvantage was outweighed by the advantages of disclosure. One thing to consider here it that carrying insurance was often required, so it was no surprise that defendant was insured. Funding is not required, so disclosing funding can be considered a much bigger "tip" than disclosing insurance.

result in a judgment over the policy limit.[28] Only by disclosing the limits of the policy can the plaintiff propose realistic offers and the case have a better chance of settling.

As straightforward as the above paragraphs may seem, there are strong counterarguments to disclosing the structure of funding and waterfall agreements. Perhaps most on point is that defendants can use details in the funding agreement to prejudice the plaintiff and the funder. Consider an example where the funding agreement is structured such that the funder's return is higher if that litigation lasts longer. This is a relatively common feature of funding agreements,[29] but defendants are typically unaware of the dates at which higher returns are triggered or how drastic those jumps are. If this information is disclosed, defendants can use it to their advantage. For example, they might try to drag the litigation out for as long as possible, knowing that the higher the funder's return becomes, the less incentive the plaintiff will have to maximize their settlement, taking a low offer because they are not getting much anyway. Or as another example, defendants might pressure plaintiffs to settle the case before a trigger date, knowing that the plaintiff will have a lot to lose if they do not settle before that date.

These examples are different from each other. The former weighs against disclosure because it directly refutes the idea that disclosure will lead to more efficient settlement and case resolution and instead shows that disclosure might give defendant incentives to drag out the case for as long as possible. The latter example actually does lead to more efficient case resolution and is nominally compliant with the policy goal of encouraging resolution, but it is extraordinarily prejudicial to the plaintiff. There are many proposals that can be made to resolve cases more quickly but that nonetheless are not utilized because of their prejudice, such as

[28] Leo P. Martinez, The Restatement of the Law of Liability Insurance and the Duty to Settle, 68 **Rutgers U. L. Rev.** 155, 156 (2015).
[29] Bedi & Marra, supra note 4 at 575.

disclosure of work-product or communications between lawyer and client. Disclosure of funding agreements might be an addition to that list.[30]

2. Control Scenario

The control scenario involves a situation where the plaintiff may have ceded control over certain aspects of litigation to the funder. This concern has been particularly salient recently, in an increasingly public dispute between Sysco Corporation and a funder, Burford Capital.[31] Sysco Corporation, a large food supplier filed a direct lawsuit against several of its suppliers alleging antitrust violations. Burford agreed to provide $140 million dollars in funding in exchange for a cut of the settlement or judgment proceeds.[32] Sysco then assigned many of the claims to third-parties, essentially removing any incentive to get a favorable settlement and breaching the terms of the funding agreement.[33] In response Burford and Sysco renegotiated the agreement to give Burford veto power over settlement. Sysco then tried to settle for what Burford claims was less than what the case is worth and vetoed the settlement. Burford then had an arbitration panel issue a TRO enjoining Sysco from settling, and now the parties are litigating the TRO, with Burford trying to prevent settlement and Sysco trying to lift the TRO, settle, and wipe their hands with the matter.

[30] There is also a concern that disclosure of the agreement, and even an acknowledgement of the presence of funding, can bias the jury against the plaintiff as the defendant can argue that it is a large financial firm rather than the injured plaintiff who will end up with any awarded damages.
[31] See In re Broiler Chicken Antitrust Litigation, Case No. 16-cv-08637 (N.D. Ill.) (detailing the initial antitrust lawsuit brought by Sysco backed by funding from Burford); Sysco Corp. v. Glaz LLC et al, No. 1:23-cv-01451 (N.D. Ill. 2023) (detailing the Sysco lawsuit against Burford to set aside arbitration ruling preventing Sysco from settling antitrust lawsuit); Glaz LLC et al v. Sysco Corp., 1:23-cv-02489 (S.D.N.Y. Mar 23, 2023) (detailing the Burford lawsuit against Sysco asking New York state court to uphold arbitration ruling).
[32] Mike Scarcella, Litigation funder Burford slams Sysco, as U.S. Chamber steps into court fight, **Reuters** (Mar. 28, 2023, 1:41 PM), https://www.reuters.com/legal/legalindustry/litigation-funder-burford-slams-sysco-us-chamber-steps-into-court-fight-2023-03-28/.
[33] Id.

Another case, Boling v. Prospect Funding Holdings, LLC, provides an additional glimpse into excessive control.[34] In Boling, the plaintiff sued a gas can manufacturer, Blitz USA, after one of their cans exploded and injured the plaintiff.[35] Plaintiff entered into two separate funding contracts with Prospect, totaling about $15,000 in funding secured only by Plaintiff's personal injury claims against Blitz USA.[36] The interest rate on the "loans" totaled about 80% per year, resulting in Plaintiff owing Prospect $340,405 from the initial $15,000 loaned.[37] Plaintiff sued Prospect, alleging, among other claims, that the loans were usurious and champertous.[38] In analyzing the agreement, the court noted that "the terms of the Agreement effectively g[a]ve Prospect substantial control over the litigation" including control over the execution of certain documents, selection and retention of attorneys, and the right to seek specific performance if Plaintiff defaulted on any terms of the funding agreement.[39] Given these restrictions, the court found the agreement to be in conflict with Kentucky's public policy in favor of settlement because "an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan.[40]"

Boling is an interesting case and worth discussing because it is rare to find a court explicitly remark on the level of control funders have in an agreement, but the court's reasoning is not persuasive. The court seems to disfavor the funding agreement at issue because the "substantial control" makes settlement more difficult.[41] But really, the above quote reveals that the court's problem is with the general structure of litigation funding, not the control carve-outs.

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[34] 771 Fed. App'x 562 (6th Cir. 2019). Finding similar scenarios is often difficult given the confidentiality to which funding agreements are held.
[35] Id. at 564.
[36] Id.
[37] Id. at 564-65.
[38] Id.
[39] Id. at 579.
[40] Id. at 580 (quoting Boling v. Prospect Funding Holdings, LLC, 2017 WL 1193064 (W.D. Ky. Mar. 30, 2017)).
[41] Id. at 579.

In any agreement where proceeds are being shared with a third party the plaintiff will have less of an incentive to settle, regardless of the degree of control exercised by the funder.

Such cases rarely fall into the public eye but provide a perfect illustration of when disclosure might be essential to efficient settlement because the funded party has ceded large amounts of control to the funder, both for efficiency and for control reasons. For efficiency, it is crucial that the defendant know that a third party has the legal right to veto any settlement offer as that will factor into the Defendant's strategy in litigating and making settlement offers.

In the Sysco/Burford dispute, for example, the antitrust defendants (Sysco's suppliers) would have benefited greatly from understanding who needed to approve a settlement on the plaintiff's side. If they knew that Burford retained a veto right, they doubtless would have made a different settlement offer and pursued an alternate litigation strategy. Instead, they settled on an amount intolerably low for Burford, leading to more litigation.

Similar to arguments made on the insurance side, defendants should know all of the parties they are adverse to and who have legal rights to make or veto decisions the plaintiff's decisions. The local rule adopted in the District of New Jersey illustrates courts grappling with the control concern, where plaintiffs are required to disclose non-parties who have control over settlement or litigation decisions.[42] While the funding-side examples do not rise to the level of insurers who control the litigation, having control over settlement or litigation strategy may nonetheless warrant some level of disclosure.

There may also be a funding corollary to the insurance disclosure goal of preventing fraudulent settlements because of defendant's misrepresentation of their assets.[43] Disclosure of funding agreements may also prevent settlements based on misrepresentations from the plaintiff,

[42] D.N.J. Civ. R. 7.1.1
[43] See infra section II(G).

the plaintiff's lawyer, or the funder based on their purported investment and needed recovery to turn a profit. For example, while a case is being litigated, a funder may represent to a defendant that they need a recovery above a certain amount to make a profit on the case, so it would not be worth the defendant's time to propose a settlement consisting of anything less. The funder also may be lying, and the resulting settlement a product of a misrepresentation. Disclosure solves this problem, as the defendant has a clearer picture of the recovery each party would need to be amenable to a settlement.

This type of situation is also a potential analog to the agency issues in insurance disclosure.[44] Funding agreements are purposely structured to align funders, lawyers, and claimholders to the largest extent possible, but they cannot be perfect. Depending on the structure of the agreement and waterfall provision, the parties on the plaintiff's side will always be somewhat misaligned in their incentives. This can lead to situations like the one envisioned in the paragraph above where the defendant can be manipulated by one party to the detriment of the others. By disclosing the funding structure, this manipulation by misrepresentation is less likely because the defendant will have a clearer view of the whole picture of the funding arrangement.

[44] See infra Section II(F).

Applicant Details

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Moot Court Experience	**No**

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June 11, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
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Dear Chief Judge Sanchez:

I am a rising third-year student at Columbia Law School, and I write to apply for a clerkship in your chambers beginning in Sep 01, 2024.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Jessica Bulman-Pozen (212 854-1028, jbulma@law.columbia.edu); Benjamin L. Liebman (212 854-0678, bliebm@law.columbia.edu), and Christina D. Ponsa-Kraus (212 854-6579, cponsa@law.columbia.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

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EDUCATION

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Honors: James Kent Scholar (2022/2023)
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Tufts University, Medford, MA
M.A. in Philosophy, received August 2021
Activities: Ethics Bowl
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Middlebury College, Middlebury, VT
B.A., *summa cum laude*, received May 2019
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Thesis: "Self-Representation and First-Person Authority: A Kantian Explanation of Immunity of Error through Misidentification"

EXPERIENCE

United States Attorney's Office for the Southern District of New York, New York, NY — Fall 2023 (expected)
Legal Extern

Weil, Gotshal & Manges LLP, New York, NY — Summer 2023
Summer Associate
Rotate between the Litigation Department and Restructuring Department.

Columbia Law School, New York, NY
Research Assistant — January 2022 – present
Conducted research with Professor Benjamin Liebman on judicial transparency in China, extraterritorial applicability of Chinese law, China's litigation reduction strategy, and its official legal ideology. Reviewed court decisions and executive documents. Wrote memos.

National Center for Law and Economic Justice, New York, NY
Legal Intern — Summer 2022
Assisted with impact litigations and policy advocacy promoting economic and racial justice. Conducted legal research on civil and administrative procedures. Reviewed documents for the discovery. Designed and conducted client interviews. Drafted Title VI complaint.

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Teaching Assistant — September 2019 – May 2021
Assisted professors in teaching undergraduate philosophy courses. Led review sessions and discussions. Graded written works with detailed commentaries. Held weekly office hours. Mentored students' writings.

LANGUAGES: Mandarin (native), German (proficient)
INTERESTS: Classical music, European literature, soccer, basketball, hiking

Columbia Law School

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CLS TRANSCRIPT (Unofficial)

06/08/2023 02:51:47

Program: Juris Doctor

Zeming Liu

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L0009-1	Columbia Law/N.Y.U. Law Exchange		3.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	B+
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L8866-1	S. Contemporary Critical Thought II	Harcourt, Bernard E.	2.0	A-
L9128-1	S. Law and Authoritarianism [Minor Writing Credit - Earned]	Khosla, Madhav; Liebman, Benjamin L.	2.0	A
L6683-1	Supervised Research Paper	Liebman, Benjamin L.	1.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Goshen, Zohar	4.0	A-
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6675-1	Major Writing Credit	Liebman, Benjamin L.	0.0	CR
L8866-1	S. Contemporary Critical Thought I	Harcourt, Bernard E.	1.0	A-
L9464-1	S. Democracy's Futures	Ahmed, Ashraf; Benhabib, Seyla	1.0	A
L6683-1	Supervised Research Paper	Liebman, Benjamin L.	2.0	A
L6822-1	Teaching Fellows	Ponsa-Kraus, Christina D.	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B
L6679-1	Foundation Year Moot Court		0.0	CR
L6271-1	Law and Legal Institutions in China	Liebman, Benjamin L.	3.0	A
L6121-12	Legal Practice Workshop II	McCamphill, Amy L.	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	B+
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	A
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-12	Legal Practice Workshop I	McCamphill, Amy L.; Yoon, Nam Jin	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 62.0

Total Earned JD Program Points: 62.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to recommend Zeming Liu for a clerkship in your chambers. Zeming is an exceptionally bright Columbia Law School student who completed an M.A. in philosophy before matriculating. He welcomes challenges; balances rigorous and precise analysis with attention to normative and theoretical questions; and brings a delightful sense of intellectual play, curiosity, and enthusiasm to his legal work. I believe he will be an excellent law clerk and recommend him to you highly.

I got to know Zeming in the fall of 2022 when he enrolled in my Legislation and Regulation course. Zeming stood out to me throughout the semester for his perceptive and enthusiastic class participation. He was always meticulously prepared for cold calls and had an impressive understanding of cases and legal rules, and he enriched our open discussions. For example, during a class discussion of I*NS v. Chadha*, Zeming highlighted tensions between formalism and functionalism in separation of powers theory and offered a critique of the Court's decision insofar as it undermined congressional capacity to control agency decision-making even as the Court's own nondelegation doctrine emphasized the importance of congressional policymaking. Several times during the semester, classmates remarked that they found Zeming's class contributions intellectually invigorating.

Given his excellent participation throughout the term, I was not surprised that Zeming wrote an excellent final exam. He offered a lucid analysis of issues ranging from the use of linguistic canons in statutory interpretation, to exceptions to the APA's notice-and-comment rulemaking requirements, to *Chevron* deference in the age of major questions. His answers were smart, careful, and creative.

Over the course of the semester, I also had the pleasure of talking with Zeming outside of class. He again offered rigorous dissections of doctrine, as well as deep and genuine engagement with the theoretical underpinnings of rules. It was a delight to watch him put together ideas from different parts of the course as well as other legal subjects. Zeming's philosophical training was also evident in these conversations. After majoring in philosophy as an undergraduate at Middlebury College—and graduating *summa cum laude* despite having immigrated to the United States at age 19—Zeming earned an M.A. in philosophy at Tufts University. He came to law school to connect his interest in moral and political philosophy to concrete social and policy issues, and he has seized opportunities to do so, both in his coursework and through extracurricular pursuits including work for the *Columbia Journal of Transnational Law*, the Law and Political Economy Society, and the Society for Chinese Law.

Let me add a brief note about Zeming's writing. Zeming was born and raised in China and, as noted above, arrived in the U.S. during his college years. Although he is fluent in English, his writing bears traces of someone who has lived in an English-speaking environment for less than a decade. I hope this will not deter you from hiring him: he has a truly exceptional mind, and I am confident he will apply his excellent work ethic to continually refining his legal writing as well as further developing other legal skills.

In sum, I believe Zeming would be an asset to any judicial chambers. In addition to his copious talents, he demonstrates concern for others, engages respectfully and considerately with everyone he encounters, and has an upbeat and friendly demeanor. If I can be of any further assistance as you consider his application, please do not hesitate to contact me.

Sincerely yours,

Jessica Bulman-Pozen

Jessica Bulman-Pozen - jbulma@law.columbia.edu - 212-854-1028

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to write in very strong support of Zeming Liu's application for a clerkship in your chambers. Zeming has a truly extraordinary intellect and will make a great clerk.

I have gotten to know Zeming in a range of contexts – student, research assistant, and more recently co-author of a piece we are writing together about recent developments in legal theory in China. Zeming is in the top five percent of students I have taught over twenty-one years at Columbia; intellectually I would put him among a handful of my very top students.

Zeming's journey to law school, and to the United States, has been non-traditional. Zeming started college at Fudan University in China, one of China's best schools. But he found the limited space for free thought to be constraining and thus started looking for options to continue his studies in the U.S. He wound up at Middle-bury. Needless to say, the shift from life in Shanghai to small-town Vermont was a shock and far from easy. But Zeming excelled at Middlebury before deciding to pursue graduate work in philosophy at Tufts. His inter-est in moral and political philosophy led him to pursue a law degree rather than a Ph.D. in philosophy.

Zeming has a long-term interest in an academic career in the U.S. (he recently became a U.S. citizen). But he is still early in his legal career, and I could also see him becoming engaged in a career in practice as well. Unlike most students, Zeming is well-aware that he is still early in his legal career and is not in a rush. He is open-minded and wants to develop a range of experiences before committing to academia. Zeming has a deep intel-lectual interest in the law; he is unusual in the degree to which he seeks to understand every legal issue he confronts. He has developed a deep love of legal argument and sees law as a series of puzzles to work through. Zeming works incredibly hard at everything he does. In particular, he has worked very hard since coming to the U.S. to become a good writer in English. He now writes both insightfully and fluently, something rare for someone who only came to the US in college.

Zeming is wonderful to talk with about almost any subject. He knows a vast amount about a huge range of topics, from Kantian philosophy to the latest political gossip from China to (European) football. He has a keen critical eye; this is one reason I have enjoyed working with him so much (he is not afraid to tell me when he does not think much of one of my arguments).

Zeming's grades in law school are good, with the exception of the spring of his One L year. That was an incred-ibly stressful semester for Zeming and many of our students with family in China, as they watched from afar as family and friends struggled with the extensive lockdowns and resulting food shortages, in particular in Shang-hai. I had a number of students from China in my class that semester, including Zeming, so I know first-hand how hard it was for them to stay focused while their families and friends suffered. More recently, Zeming was one of the two best students in a seminar I co-taught during his 2L year on law in authoritarian systems.

In sum, Zeming will be a wonderful clerk. He is thoughtful and respectful and will be a great team player. Please do not hesitate to reach out if I can provide any additional information.

Sincerely,

Benjamin L. Liebman

Benjamin Liebman - bl2075@columbia.edu - 212-854-0678

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my great pleasure to write a letter of recommendation in support of Zeming Liu's application for a clerkship in your chambers. Zeming took my Constitutional Law course in the Fall 2021 semester and served as a Teaching Assistant for the same course in the Fall 2022 semester. As that trajectory suggests, I was favorably impressed with his academic perfor-mance and his personality in the 1L course. As a TA, my impression of Zeming only grew more favorable. I enthusiastically recommend him to you.

Zeming immigrated to the United States from China at the age of 20, completing his B.A. at Middlebury College and M.A. at Tufts University in Philosophy. Despite the challeng-es that such a transition would pose, Zeming earned summa cum laude honors at Middlebury. Having taught him Constitutional Law, I am not surprised at his top-notch performance at Middlebury. Zeming's passion and talent for intellectual challenges was plainly evident in his participation in my Constitutional Law course. He spoke up regularly, and his comments and questions revealed a curious and sharp analytical mind. Zeming's superb performance in the course, both orally and on the exam, earned him an A as a final grade and led me to offer him a TA position for the following year, which he accepted. My TAs attend classes, answer student questions, and conduct regular review sessions. In addition, I meet regularly with them to discuss course materials, questions the students have raised, and other course-related issues. This particular year, I also held several additional (optional) meetings with my TAs, which Zeming attended, to brainstorm for a Constitutional Law casebook I'm working on. Zeming was a valuable participant in every conversation, consistently offering smart and in-teresting observations and suggestions. He was also a very welcome presence: his agreeable personality, unfailingly positive attitude and sense of humor complement his intellectual ri-gor.

As you evaluate his application, please know that the second semester of Zeming's first year brought unusual stress, as his partner and many close friends in Shanghai suffered severely from the effects of Omicron-related shutdowns. That stress negatively affected Zem-ing's grades in the Spring 2022 semester. I would urge you to consider those circumstances in evaluating Zeming's academic performance. His much stronger grades in the prior and sub-sequent semesters much better reflect his intelligence, capacity, and work ethic.

Zeming has a real passion for law, and in particular for the theoretical and analytical challenges it poses. He is smart and responsible. And he is very likeable. I am confident he would make an excellent law clerk and a welcome addition to any judge's chambers. I rec-ommend him without reservation.

Regards,

Christina Ponsa- Kraus
George Welwood Murray Professor of Legal History

Christina Ponsa-Kraus - cdb2124@columbia.edu - 212 - 854 - 0722

ZEMING LIU
Columbia Law School, J.D. 2024
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Clerkship Application Writing Sample

This writing sample is based on a memorandum from my 2022 summer internship at the National Center for Law and Economic Justice, a nonprofit public interest litigation group that regularly handles plaintiff-side class action lawsuits. The attorneys asked me to analyze the interpretations of the landmark Supreme Court decision *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) by different circuits. This writing sample has not been edited by others.

From: Zeming Liu
To: National Center for Law and Economic Justice
Re: Seventh Circuit Treatment of the Commonality Requirement in Employment Discrimination Class Actions After *Wal-Mart*

This memorandum focuses on the Seventh Circuit interpretation of the landmark Supreme Court decision *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), with respect to the commonality requirement for class certification under Federal Rule of Civil Procedure 23(c)(4) in employment discrimination lawsuits. In *Wal-Mart*, the plaintiffs, composed of approximately 1.5 million current and former Wal-Mart employees, alleged that the discretion exercised by their local supervisors over payments and promotion violated Title VII by incurring a disparate impact against women. Heightening the commonality requirement, the Supreme Court vacated class certification on the ground that there is no common contention "of such a nature that it is capable of class-wide resolution —which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. At the core of the opinion is that the plaintiffs failed to establish "common injury" – in this case, a disparate-impact Title VII injury – due to an absence of a showing that the employer had operated under a general discriminatory policy. Instead, decisions regarding payment and promotion decisions were within local managers' board discretion, exercised in a highly subjective manner. Under such circumstances, the requirements for class certification would not be satisfied even if the plaintiffs had established that the payment or promotion patterns differed significantly from nationwide or region-wide figures. *Id.*

The *Wal-Mart* decision was initially regarded as a heavy blow to plaintiff-side litigation alleging disparate impact, as it appeared to suggest that delegation of authority to local managers can single-handedly shield large-scale companies from class action lawsuits arising out of issues subject to local managers' independent discretion. Interpreted this way, the decision would

effectively deny the possibility of a significant portion of class actions alleging systematic discrimination on the local level. Considering the difficulty of proceeding through individual litigations rather than collectively, *Wal-Mart* seemed to be foreshadowing some major policy consequences on issues such as workplace discrimination. Indeed, some commentators even described Wal-Mart as the "death knell" of employment class actions. *See e.g.*, John C. Coffee, Jr., *"You Just Can't Get There from Here": A Primer on* Wal-Mart v. Dukes, U.S. L. WK., July 19, 2011, at 52. Yet post-*Wal-Mart* doctrinal developments suggest that the Seventh Circuit has managed to narrow down the seemingly sweeping holding in *Wal-Mart* and maintain a pragmatic standard that leaves significant space for class certification in employment discrimination lawsuits. As a result, even though *Wal-Mart* did place a higher burden on the plaintiffs seeking class certification, it failed to become a major game changer, particularly within the 7th Circuit.

A. Delegating Authority to Local Managers Does Not Itself Preclude Class Certification in the Seventh Circuit.

The key message conveyed by the Seventh Circuit is that delegation of discretionary power to local-level supervisors does not constitute a *per se* barrier against class certification, even after the *Wal-Mart* decision. *McReynolds v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (reversing the district court's denial of class certification for a group of employee-plaintiffs alleging racial discrimination in violation of Title VII under the disparate impact theory); *Bell v PNC Bank, N.A.*, 800 F.3d 360, 375 (7th Cir. 2015) (holding that the commonality requirement is satisfied if plaintiffs can show that discrimination has to do with broader company-wide policy, and not merely due to discretion exercised by local supervisors); *Ross v Gossett*, 33 F.4th 433 (7th Cir. 2022) (allowing class certification as long as the existence of a common policy is shown, regardless of whether the uniform policy reflects the visions

alleged by the plaintiffs). The cases generally interpret *Wal-Mart* as standing for the requirement that *some* organization-wide policy is necessary for class certification. For example, in *Ross*, the court notes that the contested issue in *Wal-Mart* is "the existence of *any* uniform policy." *Ross*, 33 F.4th at 438. According to the majority, the basic rationale of the *Wal-Mart* decision is that a mere theory alleging "corporate culture" that permits bias against women to infest the discretionary decisionmaking of individual local managers, absent any evidence of *affirmative* company-wide policy, cannot meet the commonality requirement. *Id.* In other words, the commonality requirement demands "some glue" holding together the alleged reasons for all those decisions by local managers. *Id.*; *Bell*, 800 F.3d at 375. Accordingly, delegation of authority itself in no way poses any obstacle. A showing of uniform policy may satisfy the requirement even in a company that delegates significant discretionary authority to local managers.

The question, then, is what kinds of showing would suffice. The landmark decision *McReynolds* provided important clarification and effectively established a flexible standard. In that case, 700 African American brokers who worked for the defendant employer, Merrill Lynch, filed a class action that charged the company with racial discrimination in employment in violation of Title VII of the Civil Rights Act. *McReynolds*, 672 F3d, at 483. Their theory was that two policies that were meant to govern the discretion of local managers led to disparate racial impact. *Id.* at 489. One was a "teaming" policy that permitted brokers in the same office to form teams whose members shared clients, and the other was an "account distribution" policy under which the company would distribute the accounts of a departing broker to competing brokers with the best records. *Id.* The plaintiffs alleged that as a result, African American brokers found it difficult to join teams predominantly composed of white brokers, which were associated

with higher revenue and more clients. *Id.* Since African American brokers failed to generate as much revenue or attract as many clients as white brokers did, they also suffered from disproportionate account distributions. *Id.* at 490.

What made the facts of this case interesting is their similarity with *Wal-Mart*: Merrill Lynch delegated significant discretion to 135 "Complex Directors" who were able to veto teams and supplement the company criteria for distributions. *Id.* In other words, the final decisions directly influencing team formations and account distributions were within the discretionary authority of local managers. Indeed, the court noted that the case is similar to *Wal-Mart* "to the extent that these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise." *Id.* If *Wal-Mart* implies that disparate impact directly caused by local-level discretion cannot establish common injury in such scenarios, it seems that class certification should be denied here as well.

The trial court indeed denied class certification, but the 7th Circuit reversed, noting that "the district judge exaggerated the impact on the feasibility and desirability of class action treatment of the fact that the exercise of discretion at the local level is undoubtedly a factor in the differential success of brokers, even if not a factor that overwhelms the effect of the corporate policies on teaming and on account distributions." *Id.* at 491. Writing for the majority, Judge Richard Posner held that plaintiffs only need to show that some company-wide policy has contributed to the disparate impact, even though it is not a predominant or significant factor. He distinguished the case from *Wal-Mart* by pointing to the existence of company-wide policies that had allegedly exacerbated disparate impact: the "teaming" policy and the "account distribution policy." These policies might not be the sole factor that caused the disparate impact: Hypothetically, there might still be severe racial discrimination by individual brokers and local

managers even without the company-wide "teaming" policy and "account distribution policy." *Id.* If those policies had not existed at all, the scenario would have been legally indistinguishable from the situation in *Wal-Mart*, and no class certification would have been granted. *Id.* However, as long as the presence of some company-wide policy has allegedly aggravated discrimination, this *incremental* discriminatory effect could serve as the basis for common injury suitable for class-wide adjudication. *Id.* Furthermore, class certification should be granted in this case even though there was no indication that the corporate level of Merrill Lynch had any *intent* to discriminate against African American brokers. *Id.* at 490. Such a question is irrelevant to the disparate impact analysis under Title VII.

B. The Commonality Requirement provided by *McReynolds* Is a Flexible One Based on Concerns for Judicial Economy.

At the heart of Judge Posner's opinion is an economic inquiry into whether the issue will be more effectively addressed on a class-wide basis. As he noted, the granting of class certification was not to suggest that there existed racial discrimination at any level of the company, or that the alleged policies indeed had a racial effect. *Id.* Rather, the point is that solving an array of individual cases in a single proceeding would be more efficient if there exists a uniform policy that is allegedly responsible for *some* personal injuries in each of those cases. The key factor for determining class certification is "whether the accuracy of the resolution would be unlikely to be enhanced by repeated proceedings." *Id.* at 483. If not, then judicial economy demands that the injuries be solved on a class-action basis.

Notably, this approach was consistent with the approach the Seventh Circuit had taken prior to the *Wal-Mart* decision. As the majority quoted from a 2003 decision, "class action treatment is appropriate and is permitted by Rule 23 when the judicial economy form

consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury." *Mejdrech v. Met-Coil Systems Corp*., 319 F.3d 910, 911 (7th Cir. 2003), cited by *McReynolds*, 672 F3d, at 491. The danger of class action proceedings, according to the majority, is that "resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury." *Id.* at 492. But if the remedy sought is injunctive relief rather than pecuniary relief, the determination of liability itself would not be adversely affected to any significant degree. *Id.*; *see also Butler v Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.").

The requirement imposed by *McReynolds* is ultimately a flexible one. A class is likely to be certified in an employment discrimination case insofar as the plaintiffs can point to a uniform policy that has causally led to some identifiable disparate impact they collectively suffer, even though that impact is an incremental one. This central holding of *McReynolds* was further affirmed in *Chicago Teachers Union, Local No. 1 v Bd. Of Educ. Of Chicago*, 797 F3d 426, 436 (7th Cir 2015) (granting class certification to a class of African American teachers and a union who alleged that the Board of Education's decision to reconstitute 10 schools – that is, to replace a school's entire staff – led to disparate impact against African American teachers and staff members). In *Chicago Teachers Union*, the process of identifying schools for reconstitution had three steps: First, the Chicago Public Schools CEO identified all schools eligible by law for reconstitution due to bad performances. *Id.* at 436. Second, the CEO narrowed down the list by

removing schools that met another objective criterion. *Id.* The third step is a subjective one: "the CEO and other high-level board members attended a series of meetings in which they discussed the types of information that the group would consider concerning schools eligible for reconstitution, and then analyzed that information." *Id.* At the end of the process, the CEO made final recommendations to the Board, all of which are accepted. The Board argued that class certification should not be granted because of the existence of the third step that involved subjective, discretionary decisionmaking. *Id.* at 435.

The court rejected the argument, holding that the first two objective steps constitute uniform policies sufficient to establish commonality: "The objective criteria in the first two steps narrowed the pool in such a way as to have a disparate impact on African American teachers." *Id.* at 436. In reaching this conclusion, the majority invoked *McReynolds* and construed it as standing for the proposition that "a company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local managers with discretion—at least where the class at issue is affected in a common manner, such as where there is a uniform policy or process applied to all." *Id.* at 438. According to the majority, the case was sufficiently similar to *McReynolds*: both involved discretionary decisionmaking tied to some company-wide practice – the uniform "teaming" and "account distribution" policies in *McReynolds* and the objective criteria regarding school reconstitution in *Chicago Teachers Union*. As long as such discretionary decisionmaking affected the class in a common manner because of such uniform practice, the commonality requirement is satisfied. *Id.* Largely consistent with the spirit of *McReynolds*, *Chicago Teachers Union* again demonstrated the flexibility of the Seventh Circuit's approach to the commonality requirement even after the seemingly harsh *Wal-Mart* decision.

C. *Wal-Mart* Still Poses Important Limits on the Eligibility of Class Certification.

It is important to note that *McReynolds* does not indicate that the existence of *any* uniform policy would meet the commonality requirement in the employment discrimination context. The mere "uniform policy" of delegating authority to local supervisors, for example, is insufficient. The Seventh Circuit made important clarification in *Bolden v Walsh Constr. Co*., 688 F3d 893 (7th Cir 2012] (holding that class certification was inappropriate because the plaintiffs' experiences differed so significantly that the case was more in line with *Wal-Mart* than *McReynolds*). In *Bolden*, 12 African American plaintiffs alleged that the defendant, the Walsh Construction Company, practiced or tolerated racial discrimination in assigning overtime work and work conditions. *Id.* at 894-95. The district court granted class certification, and the Seventh Circuit reversed. Relying on *McReynolds*, the plaintiffs argued that the fact that the company had a uniform policy of granting discretion to superintendents, together with the allegation that those superintendents' decisions had a disparate impact, justified class treatment.

The court rejected this argument, noting that the sites all had different superintendents, different policies, and different working conditions, and that the plaintiffs consequently had distinct experiences. *Id.* at 897-898. The bare existence of a company-wide policy of delegating authority to superintendents, without more substantive guidance, was insufficient for establishing commonality. *See also Bell*, 800 F.3d, at 376 ("Cases in which low-level managers use their given discretion to make individual decisions without guidance form and overarching company policy do not satisfy commonality because the evidence varies from plaintiff to plaintiff."). Importantly, the court clarified that the economic rationale in *McReynolds* does not replace the requirement that there must be a common issue at stake and emphasized that the essential focus of *Wal-Mart* is still commonality rather than manageability. *Id.* at 898. In other words, a showing

that a class action lawsuit would be manageable does not automatically make class certification proper.

How to square *McReynolds* with *Bolden*? Although the court did not specify a categorical standard as to what kind of uniform policy would satisfy the commonality requirement, our analysis of *McReynolds* and other cases does give us some clues. In the employment discrimination context, it seems the court requires a proximate causal link between the substantive content of the company-wide policy itself and the alleged discriminatory impact. For example, in *McReynolds*, the uniform "teaming" policy and "account distribution" policy altogether proximately produced some disparate racial impact – that is, the fact that African American brokers were not able to gain equal access to good sources of revenue, clients, and redistributed accounts. Not only the discriminatory impact would not have been caused but for the policies in *McReynolds*, but such impact also bore a sufficiently characteristic relationship with the policy itself. In other words, the uniform policies identified by the plaintiffs could help judges and jurors to make intelligible the patterns of the discriminatory impact to the extent that it would be intellectually productive to resolve different plaintiffs' cases in a single proceeding. In contrast, even though the mere "uniform policy" of delegation *enabled* the local-level managers to make discretionary decisions ultimately led to the alleged discriminatory impact in *Bolden*, the causal link was still not proximate enough to the extent that the patterns of discrimination could be made intelligible by such policy. Local managers did not exercise their discretion in a common way, and different plaintiffs shared different patterns of harm under different circumstances. *Bolden* 688 F3d, at 897-898. Therefore, the "uniform policy" itself could hardly contribute anything to people's understanding of the disparate impact. This is also the case for *Wal-Mart*: the harms of different plaintiffs vary so significantly that no single

common issue could ground those different cases. Under this kind of circumstance, a class action proceeding would be neither feasible nor intelligible.

The standard set forth by *McReynolds* and developed by subsequent cases thus left ample room for plaintiff-side class action litigation over employment discrimination and other like cases within the 7th Circuit jurisdiction even after *Wal-Mart*. As it turned out, the existence of delegation of discretionary decisionmaking authority to local-level managers or superintendents does not itself pose an obstacle against class certification for employment discrimination actions under Title VII. Numerous cases have shown that even though such delegation does exist, the plaintiffs can satisfy the commonality requirement by a showing that there exists some company-wide, uniform policy allegedly responsible for some disparate impact. In other words, class certification is proper if local managers exercise their discretion in a common way attributable to a uniform policy. As long as the link between the uniform policy and the disparate impact is sufficiently proximate so that an intelligible common ground to solve different plaintiffs' claims exist, it would be feasible for the court to solve the legal claims based on the identified disparate impact in a single class action proceeding.

Finally, even though this memo only discusses the 7th Circuit treatment of *Wal-Mart*, it must be noted that this particular treatment has been influential beyond the circuit border. The Fourth Circuit, for example, heavily relied on *McReynolds* and *Bolden* in holding that the district court erred in denying class certification because it "failed to consider whether in light of the discretion alleged, the discretion was exercised in a common way under some common direction, or despite the discretion alleged, another company-wide policy of discrimination was also alleged, and whether the discretionary authority at issue was exercised by high-level managers." *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 108 (4th Cir. 2013). As such, the 7th Circuit

interpretation might help class action litigations alleging employment discrimination to proceed in other federal courts as well.

Applicant Details

First Name	**Sophie**
Last Name	**Lombardo**
Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**May 2018**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Berkeley Law Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Robert-Gordon, Alexandra
arobertgordon@law.berkeley.edu
Brooks-Rubin, Brad
brooks-rubinba@state.gov
Fletcher, Laurel
lfletcher@law.berkeley.edu
510-643-4792

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SOPHIE LOMBARDO
2910 Fulton Street, Apt. 4, Berkeley, CA 94705
224.321.0250 • sophie_lombardo@berkeley.edu

June 4, 2023

The Honorable Juan R. Sanchez
U.S. District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sanchez,

I am a third-year law student at the University of California, Berkeley, School of Law, and I am writing to apply for a clerkship in your chambers during the 2024-25 term. As an aspiring litigator and as a student dedicated to advancing social justice through the law, I would truly welcome the opportunity to learn from your experiences—not only as a judge but also as a former public defender.

Prior to law school, I worked for The Sentry, an organization dedicated to disrupting the networks that profit from mass atrocities. As an investigator, I worked with whistleblowers in South Sudan, Zimbabwe, and diaspora communities to shed light on everything from public procurement fraud and environmental crime to banking sector malfeasance. Routinely immersing myself in new country contexts, legal codes, and policy tools taught me to juggle multiple complex subjects at once; to transform tangled masses of data into human stories; and to write with precision. This experience informed my decision to attend law school, and it solidified my commitment to advancing human rights within the criminal legal system.

While at Berkeley Law, I have refined my writing skills through extracurriculars and work opportunities, particularly by serving as the incoming director of Berkeley's Moot Court Team and as a researcher with the Human Rights Center. These roles have exposed me to complex legal issues, encouraged me to explore inventive arguments, and developed my voice as a cogent writer and compelling advocate. If given the opportunity, I would look forward to building upon this foundation by supporting your work for the Eastern District of Pennsylvania.

Enclosed please find a copy of my resume, my law school transcript, my writing sample, and letters of recommendation from Judge Alexandra Robert-Gordon (alexandra.rg@berkeley.edu), Professor Laurel Fletcher (lfletcher@clinical.law.berkeley.edu), and Mr. Brad Brooks-Rubin (brooks-rubinba@state.gov). Thank you for your consideration.

Respectfully,

Sophie Lombardo

SOPHIE LOMBARDO

2910 Fulton Street, Apt. 4, Berkeley, CA 94705
224.321.0250 • sophie_lombardo@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. Candidate, May 2024 | Human Rights Center Scholar

Honors: Second-Year Academic Distinction (Top 25%)

Activities: Director, Berkeley Law Moot Court Team; Articles Editor, *Berkeley Journal of International Law*; Member, BLAST Mississippi; Member, Queer Caucus

Washington University in St. Louis, St. Louis, MO
B.A., *cum laude*, History, Honors with Highest Distinction (Minor: Creative Writing), May 2018
Honors Thesis: "Robert M.W. Kempner and the Politics of Postwar Justice"

Honors: 2018 Goldstein Prize for Best Senior Honors Thesis; 2018 Boysko Award in Creative Nonfiction

Activities: Editor, *Gateway History Journal*; Student Member, WUSTL Holocaust Memorial Lecture Committee

Study Abroad: Danish Institute for Study Abroad, Program in Justice & Human Rights (Spring 2017)

EXPERIENCE

Wilson, Sonsini, Goodrich & Rosati | Washington, DC — May 2023-present
Summer Associate, Complex Litigation and Investigations

- Complete legal research and fact-intensive assignments on white collar matters and pro bono projects.

Human Rights Center, Berkeley School of Law | Berkeley, CA — June 2022-present
Graduate Student Researcher / Miller Fellow

- Conducted legal research and contributed to an Article 15 Communication to the International Criminal Court, presenting the case for charging cyberattacks on Ukraine's critical infrastructure as war crimes.

Office of the Federal Public Defender | Portland, OR — June-Aug. 2022
Summer Law Clerk

- Completed substantive legal research and writing on questions of federal and state criminal law, including motions for compassionate release and early termination. Reviewed discovery for ongoing civil litigation.

The Sentry | Washington, D.C. — Sept. 2018-Aug. 2021
Investigator / Researcher

- Investigated white collar crime linked to mass atrocities in South Sudan and Zimbabwe, particularly in extractives and procurement. Authored reports and gave interviews reflecting organizational priorities.
- Briefed government officials, banks, and multilateral bodies, including the U.N. Security Council's Panel of Experts, on evidence-based solutions to illicit finance risks.

Auschwitz Jewish Center |Oswiécim, Poland — June-July 2018
Summer Fellow

- Engaged survivors of mass atrocity, activists, and scholars in Poland on historical and contemporary relationships to Judaism and the Holocaust. Published an article in the Center's annual alumni journal.

University of Colorado-Boulder | Boulder, CO — June-Aug. 2016
Bender Mazal Research Fellow

- Conducted archival research and authored educational supplements for Dr. David Shneer's graduate seminar on Genocide & the Holocaust.

ADDITIONAL INFORMATION

Certifications: Certified Anti-Money Laundering Specialist (CAMS) (2020)

Interests: Rock climbing; cooking; reading fiction

Berkeley Law
University of California
Office of the Registrar

Sophie K Lombardo
Student ID: 3037183837
Admit Term: 2021 Fall

Printed: 2023-06-09 06:09

Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2022 Spr: Written and Oral Advocacy
Jurisprudence Award 2023 Spr: International Law

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Sean Farhang	5.0	5.0	P
LAW	201	Torts Daniel Farber	4.0	4.0	P
LAW	202.1A	Legal Research and Writing Patricia Plunkett Hurley	3.0	3.0	CR
LAW	230	Criminal Law Jonathan Glater	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Patricia Plunkett Hurley	2.0	2.0	HH
LAW	202F	Contracts Prasad Krishnamurthy	4.0	4.0	P
LAW	203	Property Molly Van Houweling	4.0	4.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Jennifer Chacon	4.0	4.0	P
LAW	226.12	Media Law&the First Amendment Geoffrey King Diana Baranetsky	1.0	1.0	CR

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	31.0	31.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	H
LAW	241	Evidence Jonah Gelbach	4.0	4.0	HH
LAW	243	Appellate Advocacy **Fulfills Writing Requirement** Alexandra Robert-Gordon	3.0	3.0	P
LAW	264.6	Health and Human Rights Eric Stover Rohini Haar	3.0	3.0	HH

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	45.0	45.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	261	International Law Katerina Linos	4.0	4.0	HH
LAW	283H	Intl Human Rights Clinic Sem Laurel Fletcher	2.0	2.0	CR
LAW	286.5	Federal Indian Law Richard Davis	4.0	4.0	P
LAW	295.5H	Intl Human Rights Law Clinic **Units Count Toward Experiential Requirement** Tayyiba Bajwa Laurel Fletcher	4.0	4.0	CR

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	59.0	59.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

Berkeley Law
University of California
Office of the Registrar

Sophie K Lombardo
Student ID: 3037183837
Admit Term: 2021 Fall

Printed: 2023-06-09 06:09
Page 2 of 2

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	220.9	First Amendment Erwin Chemerinsky	3.0	3.0	
LAW	261.73	Self Determ. Ppl in Intern Law Asa Solway	1.0	1.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	59.0	59.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

4 June, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Sophie Lombardo's application to serve as a clerk in your chambers. Sophie was a student in my Appellate Advocacy class in the fall of 2022, and I was extremely impressed by her intellectual abilities, her writing prowess, and her maturity. Sophie is a terrific combination of a strong student and an even more amazing human being. Anyone would be lucky to work with her.

I am very familiar with Sophie's writing and research skills because I reviewed multiple drafts of her work. Having served as a law clerk in District Court, a Staff Attorney at the Ninth Circuit, and now as a Superior Court judge, I know what it takes to excel in chambers. Quite simply, Sophie has an abundance of what it takes.

In Appellate Advocacy, students brief and argue a case currently pending in the California Supreme Court, following the rules of court as closely as the classroom experience allows. By reputation, it is one of the hardest classes at Berkeley Law. Students have about two weeks to research the law and absorb the record, and they must do this while learning how to write a persuasive, full-length appellate brief.

Sophie briefed and argued Taking Offense v. State of California, which involved a First Amendment challenge to a provision of the Health and Safety Code the Lesbian, Gay, Bisexual, and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights that criminalizes the willful and repeated failure to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns. Although the trial court upheld the law, the Court of Appeal reversed and held that the misgendering provision is facially unconstitutional. It reasoned that the misgendering provision is a content-based restriction of speech subject to strict scrutiny under the First Amendment. While it agreed with the State that the government had a compelling interest in eliminating discrimination on the basis of sex, including on the basis of "transgender status," the appellate court determined that the misgendering provision was "overinclusive" and thus not narrowly tailored to further the State's interest.

Every case my colleagues and I have selected over the years seems to be particularly challenging, and Taking Offense was no exception. I did not realize when we picked this case that Berkeley Law does not include the First Amendment in its constitutional law course and, consequently, that none of the students had any meaningful knowledge of the First Amendment. What this meant was that the students had to learn most of the major First Amendment doctrines while researching, structuring, and writing their arguments and learning about what makes for persuasive advocacy.

My sense is that in addition to the legal complexity involved, for Sophie, a gay woman, the subject matter presented emotional complexity as well. This difficulty only seemed to strengthen her resolve. Amazingly, she was able to channel it into a brief that was sophisticated, well-reasoned, and well supported. Many students had difficulty reconciling First Amendment free speech jurisprudence with anti-discrimination law. Sophie went deep, researched the issues extensively, and crafted an argument about how misgendering is discrimination and thus not protected expressive speech that can fairly be described as beautiful. My comments on her writing range from "well done" to "gorgeous" to "awesome." Although she did not achieve an honors grade in my class, this is only because due to a personal issue that has resolved, her brief was late and per our policy, had to be marked down. Her grade in no way reflects her achievement, which was impressive.

Sophie also excelled at the oral advocacy portion of the class. She delivered a rebuttal argument that was so stunning it literally (and I promise uncharacteristically) brought me to tears. The fact that she has won the Prosser Prize for written and oral advocacy in her first year is further evidence of Sophie's considerable skills. Her instincts are exceptional, and I am so pleased that she has continued to challenge herself (successfully) through participation in appellate advocacy competitions.

Notably, Sophie was able to produce such high-quality work while also excelling in her other courses and participating in numerous extracurricular activities. Among other pursuits, she is the director of Berkeley Law Moot Court Team, a graduate researcher and a Miller Fellow at the Human Rights Center, Articles Editor of the Berkeley Journal of International Law, and a member of BLAST Mississippi, which is a collaboration with the MacArthur Center for Justice. As is evident from Sophie's resume, she has a strong commitment to human rights and social justice. Starting in high school, she has written and lectured on the Holocaust, coauthored several reports on corruption and human rights in South Sudan and Zimbabwe, and mentored LGBT youth.

Sophie is a rare gem of a human being with an abiding passion for making the world a better and fairer place. She was an absolute pleasure to have in class and she would be a wonderful addition to any chambers.

I unreservedly recommend Sophie. If you have any questions or I can be of further help, please do not hesitate to call me.

Sincerely,

/s/ Alexandra Robert Gordon

Alexandra Robert-Gordon - arobertgordon@law.berkeley.edu

Hon. Alexandra Robert Gordon

Alexandra Robert-Gordon - arobertgordon@law.berkeley.edu

Brad Brooks-Rubin
1713 Kilbourne Pl NW
Washington DC 20010
June 2, 2023

Your Honor:

I write strongly and enthusiastically to recommend Sophie Lombardo for a judicial clerkship. I had the privilege of serving as the Managing Director of The Sentry during Sophie's tenure at the organization and watching her develop and grow quickly into one of the most trusted and reliable investigators and writers at the organization, even though she was just out of college and had years – even decades – less experience than her other, more senior colleagues. She has continued to challenge herself and advance in law school, and she will be an invaluable asset to any chambers that offers her a clerkship.

Sophie began her tenure at The Sentry directly from college, starting alongside two more experienced colleagues in our first cohort of junior investigators, joining a team of seasoned investigative journalists, former U.S. government intelligence and law enforcement personnel, and human rights advocates. Within a few months, it became clear that Sophie possessed impressive qualities as an investigator, which also clearly continue to serve her in law school and will as a clerk: curiosity, persistence, rigorousness, integrity, intellectual (and personal) honesty, willingness to challenge herself, and collegiality. The junior investigator program was a new one for the organization, and not every element was fully fleshed out and operational, but Sophie not only remained patient and flexible as the program adjusted, but she concentrated on learning and growing as much as possible and focusing on the substantive skills development.

She quickly displayed the above-referenced qualities in taking on challenging projects working with more senior investigators, particularly on South Sudan. The Sentry investigates conflict, human rights abuse, financial crime, and corruption in East and Central Africa (and has since expanded to other regions), and the issues can be difficult both intellectually and psychologically/emotionally, given the terrible impacts on the people of the affected countries and regions but often dearth of evidence that can be used in public reporting. Sophie was endlessly curious and dedicated in diving in to difficult issues, taking direction well, developing sources, identifying and exploring new directions, documenting her work rigorously, acknowledging when she'd hit a dead end, and willing to dive in for the long haul or abandon a project that turned out to be a good, but not executable, idea.

Within 6 months of her starting at The Sentry, my problem as the Managing Director was not that she was out of her depth or inexperienced as a new investigator but that she was in too much demand. Whenever any senior investigator needed assistance working through a large set of documents, developing a new idea, or found themselves stuck and in need of a new approach, the request was always the same: can I work with Sophie? She was always willing to help but learned over time the importance of identifying her limitations, following her instincts, and asking supervisors for guidance.

Two projects stand out from her time that demonstrate the qualities noted above. First, when one of our most dedicated researchers, perhaps the world's expert in her field, needed assistance working through massive troves of documents – most of which in languages that Sophie did not speak –

she still asked for Sophie. When we offered other team members who did speak the relevant languages, the response was that the researcher knew that Sophie would be what she needed to work through the details, ask the right questions, identify the missing pieces, and suggest the best follow up. That is, the researcher knew she would have command of the details but sought Sophie's instincts, judgment, and simply her collaboration to sift through those details and figure out how to present them in a public report. The project lasted a few months, but it turned out to be pivotal in the production of impactful reports.

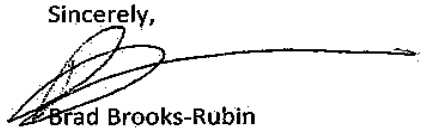
Second, when the team decided to follow the threads on an interesting but shadowy figure in South Sudan and see where it led, Sophie was again chosen as the investigator. The work involved her following up on bits of information connected to multiple countries and sectors, cold contacting a wide array of individuals and entities in these jurisdictions, learning to ask the right questions to elicit what she could learn, and then developing the plan for the next steps of the investigation. There were plenty of dead ends, but Sophie remained steadfast but clear-eyed that she would only ever learn so much. Over time, the story came together and turned into a fascinating investigation and public report. In this case, as with the previous one, her supervising investigator was located on another continent and in a different time zone, but Sophie was motivated and disciplined throughout, seeking guidance and direction as needed but working independently and with purpose.

In addition to the challenging content and expectations – indeed, because of them -- The Sentry's Investigations Department was, in all honesty, not an easy place to work. Sophie showed remarkable character and judgment in navigating a range of challenging dynamics (not of her causing) that rankled many other colleagues. She found her voice, possessed impeccable judgment, and as noted, became a colleague that everyone trusted and relied on to share confidences and think through how to approach difficult conversations and circumstances.

Finally, and perhaps most of all, Sophie is a genuinely good person to be around and spend time with. When you are dealing with intellectually and emotionally challenging and draining content and context, as you are in a chambers just as we were at The Sentry, that quality may perhaps be the most important of all.

Best of luck with the hiring process.

Sincerely,



Brad Brooks-Rubin

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is with great pleasure that I write with my highest recommendation for Sophie Lombardo to serve as a law clerk in your chambers. I had the pleasure of working closely with Sophie, as her professor and supervisor, in Berkeley Law's International Human Rights Law Clinic (IHRLC) in Spring 2023. Based on the strength of her performance, we invited Sophie to return to the Clinic in the Fall 2023 semester.

Sophie has demonstrated her excellence in legal research and writing in and outside of the classroom at Berkeley Law. She received High Honors (top 10%) in several courses and received the Prosser Prize (second highest grade) in her Written and Oral Advocacy class. She contributes to the intellectual life of the community through her leadership positions in several student organizations. Across all dimensions of her work, Sophie performs at the highest levels. I am confident that she will be an excellent clerk.

Background

The International Human Rights Law Clinic is an academic program I co-direct that marshals the resources of the faculty and students of Berkeley Law to advance the struggle for human rights on behalf of individuals and marginalized communities. Students in their second or third year enroll in the Clinic and its companion seminar for approximately one-half of their course load. Students conduct human rights advocacy under close faculty supervision in a small, tight knit learning environment. Sophie was one of approximately 14 students enrolled in the Clinic and was one of six students to work under my direct supervision.

The intimate learning environment in a clinical setting enables faculty to observe students perform a variety of legal advocacy skills. I became well-acquainted with Sophie over fourteen weeks. Outside of our seminar session, I met at least weekly with Sophie in supervision meetings, client meetings, and in individual consultations. I can say with confidence that she is an exceptional student. She has sharp analytical skills, exceptional research and writing abilities, and an enviable work ethic. In short, she has the "whole package" of smarts, skills, and commitment to public service.

Clinical Work Product

Around the world, human rights defenders (HRDs) are under increased threat from repressive governments. There is an urgent need for mechanisms to protect defenders and enable them to conduct their activities in safety. During her time in Clinic, Sophie worked on a project for a United Nations independent human rights expert, referred to as a Special Rapporteur, regarding temporary humanitarian visas for human rights defenders (HRDs). These visas can form a vital part of security strategies for HRDs when they need to leave their home country for a period of time due to increased risks they face.

The number of governments that provide temporary visa support to HRDs is extremely limited. Furthermore, when such schemes do exist, governments are sometimes reluctant to publicize them for fear of being inundated with applications. Thus, mapping the global landscape of relevant visa and relocations programs was not a straightforward nor easy task. Specifically, Sophie undertook a global survey of national immigration frameworks, identifying programs that offered specialized relocation mechanisms for human rights defenders (HRDs). She also canvassed the web to identify more than one hundred cities globally, in which non-government actors led similar initiatives. Sophie's team conducted extensive research and analysis on the existing visa schemes and temporary relocation programs to equip the Special Rapporteur as she made recommendations to governments on this important topic. The final work product was a 30-page analysis of current programs, with policy recommendations.

Sophie's Clinical Work Displays Excellent Research, Writing, and Analytical Skills

Sophie approached her research with a creative eye and a fine-toothed comb. Relying on methods that she developed as an investigator prior to law school, Sophie turned over every source available to create a database compiling the team's data as well as a map displaying their findings. The Special Rapporteur, with her decades of experience, was surprised to learn of programs that Sophie brought to her attention. It is truly a credit to Sophie's diligence and dedication to research that she was able to extend the Special Rapporteur's knowledge of the topic.

The UN is extremely cautious in who it permits to conduct research on its behalf because the reputational and material stakes are so high. Based on her careful desk research, the Special Rapporteur entrusted Sophie to conduct interviews with leading governments and humanitarian organizations about their work and views on the subject. It is a testament to Sophie's research skills and professional judgement that the Special Rapporteur made personal introductions to key stakeholders, soliciting their agreement to an interview with Sophie. Sophie further impressed the Special Rapporteur by focusing attention on the gaps about the nature and scope of temporary visa schemes to generate an interview guide for the stakeholder interviews. She conducted interviews with experts in Africa, Central America, and the United States. For each interview, Sophie prepared thoroughly and

demonstrated her mastery of the topic and her familiarity with the work of the organization. During interviews, she put stakeholders at ease with her warm, inquisitive manner, and command of the topic. She knows when to follow up for additional information, and when the interviewee is ready to move on to the next topic. I saw time and again, Sophie's attention to detail enabled her to recall an earlier statement that appeared to contradict or modify a later observation an interview subject offered. She is an attentive and active listener who also thinks analytically in the moment. This excellent situational judgment prepares Sophie to perform sophisticated legal research.

When it came time to communicate her findings in writing, Sophie impressed me with her ability to synthesize large quantities of data into a concise, well-organized, and meticulously cited memorandum. She writes quickly, clearly, and with precision of language. Sophie welcomes feedback and enjoys the intellectual give and take of working through the implications of a thorny policy issue through multiple drafts. She is intellectually curious and genuinely likes turning over an issue in conversation and through drafts. She consistently showed initiative to research new leads. Sophie struck the right balance in working independently and checking in to keep me updated and ensure she was on the right track. She is a seasoned writer and researcher beyond her years. I have no doubt she has the skills and temperament to be a successful clerk.

Sophie's approach to wrestling with legal questions also meaningfully shaped our seminar discussions, particularly during sessions at which other students presented their ongoing work for feedback. For example, when students working on a case seeking to attribute criminal misconduct of criminal gangs to the State hit a research roadblock, Sophie asked probing questions, suggested a line of cases from another international jurisdiction that could be helpful, and recommended experts whose research on organized crime could help them overcome their hurdle.

Finally, Sophie is a wonderful colleague. She takes every opportunity to contribute to the clinic's success through her dedication to the work, her humility, and her sense of humor. She received constructive feedback with grace; approached interviews with equal measures of enthusiasm and thoughtfulness; and was always ready to step up to meet unexpected scheduling changes or any number of inevitable course corrections required by working on live matters with deadlines.

Conclusion

I recommend Sophie as a clerk wholeheartedly. Her keen eye for research, her attention to detail—both in her own writing and in reviewing the work of peers—and her strength as a team player will make her an asset in your chambers. I urge you to give her application careful consideration.

Please let me know if I can provide any additional information regarding Sophie's candidacy.

Sincerely,

Laurel E. Fletcher

Laurel Fletcher - lfletcher@law.berkeley.edu - 510-643-4792

Sophie Lombardo

University of California, Berkeley, School of Law

Opening Brief on the Merits

The writing sample below is an excerpt from the final brief I submitted for my Appellate Advocacy class in Fall 2022. Based on the record for a case pending before the California Supreme Court, *Taking Offense v. State of California*, I drafted a brief and presented an oral argument on behalf of the respondent, State of California. The research, analysis, and writing are substantially my own, including revisions based on comments provided by my professor. Where indicated, I have omitted portions of this brief for brevity.

QUESTIONS PRESENTED

[Omitted for brevity]

INTRODUCTION

For decades, senior members of the lesbian, bisexual, gay, transgender, and queer community (LGBTQ+) have foregone potentially life-saving care due to the threat of discrimination. In response, the State of California adopted Senate Bill 219, prohibiting employees of long-term care facilities from engaging in discriminatory misconduct, including by misgendering their patients. In so doing, the State sought to accomplish one thing: decrease harm to a vulnerable community.

Misgendering causes a significant injury from which LGBTQ+ residents of long-term care facilities cannot—and should not be expected to—escape. A refusal to see one of the most fundamental aspects of a person's identity is humiliating and traumatizing regardless of where it occurs. When it is inflicted in long-term care facilities, by the very people entrusted with an individual's care, that expression is no longer mere speech—it is discrimination against a captive audience. The fact that such conduct is carried out through words does not strip the State of its authority to protect the health and safety of its citizens.

The trial court upheld the misgendering provision as a content-neutral time, place, or manner restriction, but the Court of Appeal reversed, rigidly applying an inapposite standard that governs pure speech in a public forum. As a result, the lower court erroneously concluded that the State may not protect one of its most vulnerable communities from discriminatory misconduct. Contrary to the Court of Appeal's holding, S.B. 219's misgendering provision prohibits only a narrow set of words so harmful that they alter the conditions of care in a private forum. By virtue of its limited scope, it does not burden any more speech than necessary, and it is therefore not overbroad. Likewise, because of its plain text and purpose, it is not impermissibly vague. The State is empowered to regulate as it has. To hold otherwise would not only jeopardize the lives of a community whom the State has

both the right and the obligation to protect, but it would also shake the foundation upon which much of our state and federal antidiscrimination legislation stands. The First Amendment guarantees an individual's fundamental right to expression, but it does not hand speakers a blank check to discriminate. Accordingly, the State of California respectfully requests that this Court reverse the Court of Appeal and uphold S.B. 219.

STATEMENT OF FACTS

I. California's Legislature Identified Anti-LGBTQ+ Discrimination as a Cause of Health Inequities.

For decades, California's community of LGBTQ+ seniors has suffered from serious disparities in access to basic healthcare. Numerous studies regarding these long-term challenges revealed that, as a result of "lifelong experiences of marginalization," older members of the LGBTQ+ community have a greater need for this care than their cisgender- and straight-identifying counterparts. Joint Appendix (hereinafter JA) 20. According to a survey of LGBTQ+ senior citizens in San Francisco, nearly one-third of respondents disclosed that they were in poor health; nearly half stated that they had disabilities; and one-third of all male participants reported that they had HIV/AIDS. JA 21. Another study found that 60% of participants lived alone, and only 15% had children. JA 21. Of the small percentage who were parents, only 40% reported that their children would "be available to assist them" with their daily needs. JA 21. Based upon these metrics, the Legislature found that LGBTQ+ seniors are at a "high risk for isolation, poverty, homelessness, and premature institutionalization." JA 20.

Despite the community's increased need for services, however, the Legislature also found that LGBTQ+ seniors are far less likely to access healthcare and assisted-living services than those who do not identify as LGBTQ+. JA 21. "Even when their health, safety, and security depend on it," LGBTQ+ seniors reported that they did not feel comfortable seeking out care. JA 20. And for good reason. One in five transgender adults has been denied healthcare because of their gender identity. Nearly half have experienced discrimination in a place of public

accommodation. And of the respondents who did reside in long-term care facilities, 43% reported that they had either witnessed or experienced mistreatment as a result of their LGBTQ+ status. JA 20.

These experiences have not only diminished the quality of life that LGBTQ+ residents enjoy in long-term care facilities, but they also have resulted in harmful perceptions about seeking care in the first place, perpetuating a dangerous cycle. JA 20. Faced with a choice between remaining in "the privacy of…their own home," where they do not have access to "necessary care and services," and entering a space where "they must rely on others for [that] care," many LGBTQ+ seniors have opted for the former. JA 22. According to survey results from "Stories from the Field: LGBT Older Adults in Long-Term Care Facilities," 81% percent of respondents believed that "other residents would discriminate against an LGBT elder in a long-term care facility." JA 20. An even greater share of respondents—89%—believed that staff would discriminate against LGBTQ+ residents. JA 22. And nearly 53% of all respondents believed that employees' discriminatory conduct "would rise to the level of abuse or neglect." JA 22.

II. To improve LGBTQ+ Seniors' Access to Essential Services, the Legislature Enacted the LGBT Long-Term Care Facility Residents' Bill of Rights.

In light of these studies, the State found that though existing federal and state laws had established certain minimum standards of care in long-term care facilities, "the promise of these laws" had not yet been realized for LGBTQ+ residents. JA 22. To redress this wrong and "accelerate the process of freeing LGBT residents and patients from discrimination," the Legislature enacted Senate Bill No. 219 (S.B. 219), also known as the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights.

Building upon federal antidiscrimination laws that guarantee a long-term care facility resident's right to be treated with "dignity" and "respect" and to live "free from physical or mental abuse," S.B. 219 amended several sections of California's Health and Safety Code regulating long-term care facilities. JA 22.

Specifically, Section 1439.51 made it "unlawful for a long-term care facility or facility staff to take any of the following actions wholly or partially on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status." JA 23. Section 1439.51(a)(5) ("the misgendering provision") further prohibits "willfully and repeatedly fail[ing] to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns." JA 23. Like many other state and federal antidiscrimination laws, violations of the misgendering provision may be prosecuted as misdemeanor criminal offenses, punishable by a fine no greater than $2,500, 180 days' imprisonment in the county jail, or both. Cal. Health & Safety Code § 1290(c). When determining punishment, courts have been instructed to consider: 1) "[w]hether the violation exposed the patient to the risk of death or serious physical harm," 2) "[w]hether the violation had a direct or immediate relationship to the health, safety, or security of the patient," 3) "[e]vidence…of willfulness," 4) "[t]he number of repeated violations," and 5) "good faith efforts by the defendant to prevent the violation." *Id*.

III. Procedural History

[Omitted for brevity]

STANDARD OF REVIEW

[Omitted for brevity]

ARGUMENT

I. Because California's Misgendering Provision Regulates Discriminatory Conduct Rather Than Speech, it Raises No First Amendment Issue.

In adopting the LGBT Long-Term Care Facility Residents' Bill of Rights, the State of California sought to eliminate invidious discrimination against one of its most vulnerable communities. Informed by studies showing the chilling effect of anti-LGBTQ+ discrimination on access to healthcare, the Legislature prohibited the most frequent and harmful misconduct that senior members of the LGBTQ+

community experience in long-term care facilities. Because it alters the conditions of care received by LGBTQ+ residents, misgendering—refusing to refer to someone by the pronouns with which they identify—was one such act. S.B. 219's misgendering provision therefore regulates discriminatory conduct rather than speech, and the Court of Appeal erred in treating it as a content-based restriction of expression. In this context, misgendering enjoys no protection under the First Amendment, intermediate scrutiny applies, and it easily survives review.

A. The Misgendering Provision is Presumptively Constitutional, and Petitioner Taking Offense Cannot Meet its Heavy Burden of Proving Conflict.

[Omitted for brevity]

B. The Misgendering Provision Regulates Misconduct; Any Burden on Speech is Incidental to That Conduct.

Where, as here, "speech" and "nonspeech" elements fall within "the same course of conduct," the Supreme Court has held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). Eliminating discrimination "and assuring…citizens equal access to publicly available goods and services," has been recognized as a compelling interest "of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *see also North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008) (holding that the state has a compelling interest in "ensuring full and equal access to medical treatment irrespective of sexual orientation"). The mere fact that an act "express[es] a discriminatory idea or philosophy" does not therefore "shield[] [it] from regulation." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 389-90 (1992). Because "acts of invidious discrimination…produce special harms distinct from their communicative impact," courts have held that they "are entitled to no constitutional protection." *Jaycees*, 468 U.S. at 628; *see also Robinson v. Jacksonville Shipyards, Inc.* 760 F.Supp. 1486, 1535 (M.D. Fla. 1991) (holding that "pictures and verbal

harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment").

In enacting S.B. 219, the Legislature followed a well-worn path to regulate verbal conduct amounting to discrimination. In 1959, the State passed the Fair Housing and Employment Act (FEHA), finding that workplace discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 129 (1999) (quoting FEHA § 12920). In relevant part, FEHA banned verbal harassment on the basis of race and national origin as one form of employment discrimination, identifying "epithets, derogatory comments or slurs on a basis enumerated in the Act." *Id.* at 129 (quoting California Code of Regulations, title 2, section 7287.6, subdivision (b)(1)(A)).

In *Aguilar v. Avis Rent A Car System, Inc.*, this Court upheld an injunction prohibiting the manager of a rental car company from using derogatory racial or ethnic epithets in the workplace. *Id.* at 150. In that case, a trial court found that Avis manager John Lawrence's "constant[]" barrage of racial epithets toward Latino drivers amounted to employment discrimination in violation of Title VII, and it issued an injunction precluding him from future verbal harassment. *Id.* at 136. This Court affirmed, holding that "use of racial epithets in the workplace does not violate the right to freedom of speech" when "the use of such epithets will contribute to the continuation of a hostile or abusive work environment" that gives rise to "employment discrimination." *Id.* at 135.

As in *Aguilar v. Avis*, courts have recognized that the creation of such a hostile environment may occur entirely through speech. In some of these cases, they have not even addressed the First Amendment implications of an antidiscrimination claim. In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that a company executive's frequent insults and "unwanted sexual innuendos" created an abusive work environment for one of the company's female employees. 510 U.S. 17, 19 (1993). There, the misconduct at issue was solely verbal in nature.

Nevertheless, the Supreme Court recognized Harris's discrimination claim, observing that verbal harassment has clear tangible harms, often "detract[ing] from employees' job performance, discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers." *Id.* at 22. To that end, the Court unanimously held that verbal conduct could cultivate an environment reasonably and actually perceived "as hostile or abusive," even without proving the recipient had suffered a "concrete psychological harm." *Id.*

Here, the misgendering provision regulates speech that, much like the "unwanted sexual innuendos" at issue in *Harris*, cultivates a toxic environment for LGBTQ+ residents of long-term care facilities. *Id.* at 19. As the Legislature found, LGBTQ+ residents have consistently reported experiences of discrimination on the basis of sexual orientation or gender identity, including being "abruptly discharged," subjected to "verbal or physical harassment," and misgendered by staff. JA 22. According to a 2013 survey of LGBTQ+ seniors in San Francisco, "nearly one-half of the participants…reported experiencing discrimination in the prior 12 months because of their sexual orientation or gender identity." JA 22.

C. Misgendering is Discrimination, Not Speech.

The misconduct prohibited by S.B. 219's misgendering provision amounts to discrimination for two reasons. First, intentional misgendering is humiliating and disparate treatment on the basis of sex. Second, misgendering inflicts significant, special harms within the context of long-term care facilities, impermissibly altering the conditions of care. It therefore enjoys no constitutional protection under the First Amendment. *See Jaycees*, 468 U.S. at 628.

While "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," courts have rejected the notion that all such conduct enjoys First Amendment protections. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Rather, the Supreme Court has held, "expressive activities that produce special harms distinct from their communicative impact" enjoy "no constitutional protection." *Jaycees*, 468 U.S. at 628. Special harms include fighting words, which

threaten the public peace; obscenity, profanity, and threats of violence. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568; *see also In re Joshua H.*, 13 Cal. App. 4th 1734, 1739, 1749 (1993) (upholding hate crime statute because it "proscribe[s] an especially egregious type of *conduct*," not the bigoted thought behind it). Discrimination has been recognized as another such harm, even when it "may be characterized as a form of exercising" one's First Amendment rights. *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973); *see also R.A.V.*, 505 U.S. at 390 ("sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices").

The misgendering provision prohibits "willful and repeated" misgendering when it is motivated by "a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status." Cal. Health and Safety Code § 1439.51(a)(5). An employee's refusal to use the pronouns with which a resident identifies would only violate this provision if it were animated by their disagreement with how a resident represents their gender.[1] This is discrimination on the basis of sex. *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1737 (holding that Title VII's prohibition of sex discrimination protects homosexual and transgender employees).

Second, misgendering inflicts significant harms on LGBTQ+ residents of long-term care facilities, not only violating their rights to a dignified existence and self-determination, but also impermissibly diminishing their standard of care. Because misgendering is a "verbal practice[] meant to express social inferiority, [and] exclusion," it undercuts state and federal policies requiring long-term care facilities to treat all residents with "respect and dignity." *See* Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2228 (December 2021); 42

[1] If an employee takes no issue with using masculine pronouns for a resident assigned male at birth, but they refuse to use masculine pronouns for a resident assigned female at birth, "[s]ex plays a necessary and undisguisable role in the decision." They treat the second resident differently because of "traits or actions" they "would not have questioned in members of a different sex." *Bostock*, 140 S.Ct. at 1737.

U.S.C. § 483.10(a)-(b). When employees misgender one of their patients, they refuse to recognize "the most personal expression of one's self." *Taking Offense v. State*, 66 Cal. App. 5th 696, 732 (Robie, J., concurring). Refusing to honor another person's identity "is simply rude, insulting, and cruel." *Id.* It accomplishes nothing other than the denial of a resident's right to a "dignified existence, [and] self-determination," on the basis of a protected characteristic. 42 U.S.C. § 483.10(a)-(b); *see also Bostock,* 140 S.Ct. at 1741.

That cruelty inflicts serious and disproportionate harms on the LGBTQ+ community. As the Legislature noted, 43% of long-term care facility residents surveyed in a recent study had either witnessed or experienced mistreatment due to their gender identity or sexual orientation. JA 20. Nearly half had experienced discrimination in a place of public accommodation. JA 20. Willful misgendering falls within this broader constellation of discriminatory conduct because it threatens the "autonomy, dignity, privacy, and self-identity" of LGBTQ+ individuals. Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. at 2260. Indeed, it is one of the most pervasive harms that LGBTQ+ seniors observed in long-term care facilities. JA 20.

In *Prescott v. Rady Children's Hospital—San Diego*, the District Court for the Southern District of California likewise recognized misgendering as unlawful discrimination, the ramifications of which can be devastating. 265 F.Supp.3d 1090 (S.D. Cal. 2017). In that case, Katharine Prescott brought her transgender son Kyler to Rady Children's Hospital for treatment related to suicidal ideation and gender dysphoria. *Id.* at 1096. Upon his admission, both Kyler and his mother informed staff of "his need to be referred to exclusively with male gender pronouns." *Id*. Although Kyler's medical records "reflected his legal name and gender change…staff repeatedly addressed and referred to Kyler as a girl, using feminine pronouns." *Id.* at 1096-97. One employee even explained their refusal, stating, "Honey, I would call you 'he,' but you're such a pretty girl." *Id.* at 1097. Though Kyler's "continuing depression and suicidal thoughts" continued to concern his medical providers, they ordered him "discharged early…because of the staff's conduct." *Id.* Just one month after his discharge, Kyler died by suicide. *Id.* After his

death, the district court permitted Kyler's mother to seek damages related to the hospital's discrimination. *Id.* at 1105-06.

By the same token, courts have recognized that affirming an individual's gender identity can "provide [someone] a great deal of support." *Kluge v. Brownsburg Community Sch. Corp.*, 548 F. Supp. 3d 814, 818-19 (S.D. Ind. 2021); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020). In such cases, "a name carries with it enough importance" that "a policy that requires staff to use transgender students' preferred names" can "overcome a public school corporation's duty to accommodate a teacher's sincerely held religious beliefs." *Kluge*, 548 F. Supp. 3d at 849.

Misgendering diminishes the quality of life and the quality of care that LGBTQ+ residents receive in long-term care facilities, the consequences of which include substantially worse health outcomes. Because S.B. 219's misgendering provision seeks only to prohibit the use of language that amounts to discrimination against LGBTQ+ residents, it should be treated as a restriction of conduct subject to intermediate scrutiny.

II. Even if the Misgendering Provision Is Reviewed as a Regulation of Speech, It is Subject to Intermediate Scrutiny Because Residents of Long-Term Care Facilities Are a Captive Audience.

Even if this Court holds that the misgendering provision regulates speech, the restrictions it imposes are constitutional because of the particular context in which they apply. In every major case implicating a restriction of expressive conduct, the Supreme Court has weighed factors such as the nature of the forum, the degree of the harm, and the captivity of the audience in its assessment of a regulation's constitutionality. *Frisby v. Schultz*, 487 U.S. 474, 479 ("To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech"); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974). Because the misgendering provision regulates only a narrow set of words directed at a captive audience in a private, residential forum, the captive audience doctrine applies. Moreover, because the misgendering provision seeks only

to eliminate a particular kind of harm within long-term care facilities, it is a time, place, manner restriction subject to intermediate scrutiny. The Court of Appeal therefore erred in holding that the misgendering provision was a content-based restriction of speech.

A. LGBTQ+ Residents of Long-Term Care Facilities Are Captive Listeners.

Where, as here, the audience "has no reasonable way to escape hearing an unwelcome message," courts have recognized that "greater restrictions on a speaker's freedom of expression may be tolerated." *Aguilar*, 21 Cal. 4th at 159 (Werdegar, J., concurring). This has held true even in cases where the regulation distinguished according to content. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 308 (1974) ("I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it") (Douglas, J., concurring); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 729 (1970) (upholding a regulation permitting mailers to remove their names from mailing lists that a given householder may find offensive). To that end, this Court has never required an audience incapable of avoiding offensive or uninvited messages to endure the indignities of dehumanizing or offensive language. *See, e.g., Aguilar*, 21 Cal. 4th 121 (Werdegar, J., concurring).

Rather, numerous decisions show that an unwilling listener's capacity to leave is "relevant and important, if not dispositive…in determining whether government restrictions on speech…are permissible under the First Amendment." *Aguilar*, 21 Cal. 4th at 162 (Werdegar, J., concurring); *see also Erzoznik v. City of Jacksonville*, 422 U.S. 205, n.6 ("It may not be the content of the speech, as much as the deliberate 'verbal (or visual assault)' that justifies proscription") (citation omitted). Guided by this principle, the high court has upheld the rights of commuters not to be subjected to advertising campaigns; of employees not to be subjected to harassing speech; and of school students not to be subjected to a classmate's lewd presentation. *Lehman v. City of Shaker Heights*, 418 U.S. 298

(1974); *Aguilar v. Avis Rent A Car System*, 21 Cal. 4th 121, 154 (1999); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

In *Frisby v. Schultz*, for example, the Supreme Court upheld an anti-picketing ordinance under the captive audience doctrine. 487 U.S. 474. There, a Wisconsin town adopted an ordinance banning picketing "before or about" individual homes. *Id*. at 476. The Supreme Court held that when aggressive and targeted "picketing is narrowly directed at the household, not the public," residents are "figuratively, and perhaps literally, trapped within the home." *Id*. at 487. "Because of the unique and subtle impact of such picketing," residents would be "left with no means of avoiding the unwanted speech." *Id*.

Likewise, in *Madsen v. Women's Health Center, Inc.*, the Supreme Court recognized that patients entering medical facilities are a captive audience. 512 U.S. 753 (1994). Upholding an ordinance prohibiting certain picketing activities within 100 feet of healthcare facilities, the Court observed that "picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance." *Id*. at 768. Recognizing that hospitals are spaces "where patients and relatives alike often are under emotional strain and worry," and where "pleasing and comforting patients are principal facets of the day's activity," the Court held that "the First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Id.* at 772-73.

Even more so than captive streetcar commuters, many LGBTQ+ seniors find themselves in long-term care facilities "as a matter of necessity, not of choice." *See Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952). LGBTQ+ senior citizens are far less likely to benefit from external familial or social support than non-LGBTQ+ seniors, a direct consequence of their "lifelong experiences of marginalization." JA 20. Absent such social or financial support, they have less freedom to lean on private caretakers, and consequently, they have far less choice in where they live as they age. JA 21. A long-term care facility may be their only option. Moreover, recognizing that many LGBTQ+ seniors are infirm, they may have difficulty

physically removing themselves from any given space without the assistance of others. JA 21 (finding that nearly half of LGBTQ+ residents in a San Francisco survey have disabilities).

As a result, LGBTQ+ residents of long-term care facilities are, much like the patients in *Madsen* and the residents in *Frisby*, "left with no means of avoiding…unwanted speech." *Frisby*, 487 U.S. at 487. Should an employee charged with their care insist upon misgendering, they may not have the physical, financial, or logistical means to "escape hearing [that] unwelcome message." *Aguilar*, 21 Cal. 4th at 159 (Werdegar, J., concurring). Given that some of the "principal facets" of a long-term care facility's daily functions are, similarly to hospitals, "pleasing and comforting patients" who may be under significant "emotional strain," their inability to avoid discriminatory speech is particularly significant. *See Madsen*, 512 U.S. at 772-73. To that end, residents are a captive audience, and they have a substantial interest in not being compelled to listen to discriminatory speech. *See Pub. Util. Comm'n v. Pollak*, 343 U.S. at 468.

B. Because the Misgendering Provision Applies Only Within Long-Term Care Facilities, It Is a Time, Place, or Manner Restriction.

Recognizing that residents of long-term care facilities are a captive audience within a private, residential setting, the Legislature enacted the misgendering provision to regulate conduct that interferes with the provision of critical care. Because it seeks not to restrict the broader dialogue around gender identity, but rather the time, place, and manner in which the use of preferred pronouns occurs, the misgendering provision is a content-neutral regulation subject to intermediate scrutiny.

Courts have observed that "the nature of a place, 'the pattern of its normal activities, dictate[s]" whether a restriction on the basis of time, place, or manner is reasonable. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Numerous cases reflect the principle that where expression is incompatible with a given place's purpose, government regulation of speech are permissible. *See, e.g. Aguilar*, 21 Cal. 4th at 155 (Werdegar, J., concurring) (quoting *Perry Educ. Ass'n v. Perry Local*

Educators' Ass'n, 460 U.S. 37 at 46 (1983)) (holding that "speech in nonpublic fora is subject to reasonable time, place and manner restrictions, and "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

This inquiry turns in part on the nature of the forum. In public forums where debate has traditionally occurred, the Court has observed that the government's "selective exclusions" of certain views "must be carefully scrutinized." *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). In *Police Department of Chicago v. Mosley*, for example, the Supreme Court struck down an ordinance that "exempt[ed] peaceful labor picketing from its general prohibition on pikceting (sic) next to a school," holding that the government may not create "[s]elective exclusions from a public forum…based on [or justified by] content alone." *Id*. at 94, 96. Likewise, in *Carey v. Brown*, the Court held that, when the state enacts general prohibitions on picketing near private residences, it may not grant an exemption to labor protests. 447 U.S. 455 (1980). Doing so, it reasoned, impermissibly "presuppose[d] that labor picketing is more deserving of First Amendment protection than…public protests over other issues." *Id*. at 466; *see also Perry*, 460 U.S. at 54-55 (observing that in both *Mosely* and *Carey*, "[t]he key…was the presence of a public forum," not the "distinction between classes of speech").

By contrast, in private forums such as hospitals and homes, the Court has frequently recognized that the government has greater authority to regulate speech. Within residential settings, the State's capacity to legislate is particularly great, as its interest in preserving the privacy rights that "all citizens enjoy within their own walls" is significant. *Frisby*, 487 U.S. at 484. Private workplaces, while not recognized as public or private forums, have been regulated similarly, as they "are not usually thought of as marketplaces for the testing of political and social ideas." *See Aguilar*, 21 Cal. 4th at 159 (Werdeger, J., concurring).

Unlike the picketers standing on the "public streets" of Brookfield, the employees of long-term care facilities conduct much of their professional work

within the confines of a quintessentially private forum," the resident's home. *See Frisby*, 487 U.S. at 484-85. As caretakers, they perform their duties within intimate spaces, from bedrooms and bathrooms to kitchens and closets. These areas are far from the "streets and parks…immemorially…held in the public trust." *Id.* at 481. In that respect, they are not "marketplaces for the testing of political and social ideas." *See Aguilar*, 21 Cal. 4th at 159 (Werdeger, J., concurring). Rather, they are the spaces to which elderly, infirm seniors retreat from the world. As both federal law and the State of California have made clear, "the nature" of long-term care facilities is one in which a resident's health, dignity, and well-being are prioritized. *See Grayned*, 408 U.S. at 116; JA 22. The "pattern" of facilities' normal activities dictates that employees' conduct advance these priorities. *See Grayned*, 408 U.S. at 116. Misgendering is incompatible with these goals because it attacks an LGBTQ+ individual's "autonomy, dignity, privacy, and self-identity." Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. at 2260.

C. The Court of Appeal Erred in Treating the Misgendering Provision As a Content-Based Restriction of Speech.

[Omitted for brevity]

III. While the Misgendering Provision Survives Any Tier of Scrutiny, Intermediate Scrutiny Applies.

[Omitted for brevity]

A. The State of California Has a Compelling Interest in Eradicating Discrimination Against Its LGBTQ+ Residents

[Omitted for brevity]

B. The Misgendering Provision is Narrowly Tailored to Advance That Compelling Interest.

[Omitted for brevity]

IV. The Misgendering Provision is Neither Void for Vagueness, Nor Impermissibly Overbroad.

[Omitted for brevity]

Conclusion

[Omitted for brevity]

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Law Journal**
Moot Court Experience	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

The Honorable Juan Ramon Sánchez
14613 U.S. Courthouse
Courtroom 14-B
601 Market Street
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Dear Judge Sánchez,

I am a rising third-year student at Georgetown University Law Center and the Senior Administrative Editor of the Georgetown Law Journal. I am writing to apply for a 2024-2025 term clerkship in your chambers. In college, I spent several summers in Pennsylvania and absolutely fell in love with the state.

I am eager to gain valuable legal experience and insight into the judicial process, and a clerkship would provide the ideal opportunity to do so. Specifically, I am interested in learning about the inner workings of judicial decision-making and observing different lawyering practices, which I hope to use to inform my own lawyering practices. Also, because I am the first in my family to become a lawyer, having a strong mentor will be a critical asset for my growth as a lawyer and practitioner. Lastly, law school has been an excellent environment for me to engage in independent critical thinking and I am deeply interested in continuing to think critically about the law and its application in the world.

As an aspiring juvenile public defender with a passion for public interest work, I will be a strong addition to your chambers. My work experience demonstrates my commitment and care in serving diverse communities. By providing direct services, with an added policy perspective, I have continued to sharpen my legal research and writing skills by conducting complicated fact investigations, applying state and federal laws to the facts I have gathered, and documenting my findings and analysis in memorandums to ensure that I am considering all relevant factors before finalizing any decision. My legal writing experience is also varied, with work including highly technical editing, drafting legal documents, and producing memorandums. Further as Senior Administrative Editor of the Georgetown Law Journal, I assist in managing 120 students and running our entire Journal's source collect process. Through my strong project management, leadership skills, and meticulous approach to the work, I help keep the team organized, on schedule, and ensure the Journal publishes accurate and polished work.

Further, as a Chinese American adoptee, I have developed a nuanced perspective on the law informed by my lived experiences. I have learned to navigate the world with a deep understanding and appreciation of diverse perspectives. This appreciation has only deepened in law school, particularly after completing a seminar on Conservative Legal Thought. My experiences within and outside the legal field have dually emphasized to me that engaging in respectful dialogue only enriches understanding of complex legal issues and adds rightful legitimacy to the judicial system.

I am particularly interested in working in your chambers because of your past experience as a public defender. Compassionate jurisprudence and access to justice are very important to me and I am eager to learn from you about how your past experience as a public defender has shaped your jurisprudence.

My resume, unofficial transcript, and writing sample are submitted with this application. Georgetown will submit my recommendations from Professors Cannon, Seidman, and Simmons under separate cover. I would welcome the opportunity to interview and look forward to hearing from you soon.

Sincerely,

Isabelle Long

Isabelle Long

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EDUCATION

Georgetown University Law Center **Washington, DC**
Juris Doctor Expected May 2024
GPA: 3.68
Journal: *The Georgetown Law Journal* (111 Staff, 112 Senior Administrative Editor)
Activities: Public Interest Fellow; American Constitution Society; Asian Pacific American Law Student Association (former 1L Elected Delegate); Georgetown Defenders; OutLaw LGBTQ+ Student Member

Smith College **Northampton, MA**
Bachelor of Arts, *magna cum laude* (3.95), in Psychology with a minor in Theater Studies May 2020
Honors: Phi Betta Kappa; Psy Chi

EXPERIENCE

Maryland Office of the Public Defender **Baltimore, MD**
Juvenile Division Law Clerk May 2023-present

- Assisting attorneys representing juveniles in misdemeanor and felony cases
- Drafting modification motions, locating and interviewing witnesses, drafting letters and memos, conducting research, assisting with case development, and observing Juvenile court

Health Justice Alliance Clinic **Washington, DC**
Student Attorney Jan. 2023–April 2023

- Provided legal representation to patient families of Georgetown's Division of Community Pediatrics in the areas of housing, public benefits, education, and family law
- Conducted legal intakes with clients; interviewed clients; conducted fact investigation; connected clients to resources in the community; collaborated with healthcare and social work partners; engaged in legal research and writing, including writing memos, complaints, and other advocacy documents

Professor Louis Michael Seidman **Washington, DC**
Research Assistant Jan. 2023–April 2023

- Researched and analyzing various constitutional topics, including the constitutional theory of the current Supreme Court Justices and the modern academic constitutional theory of free speech

Children's Law Center **Washington, DC**
Policy Law Clerk May 2022 – Aug. 2022

- Researched, analyzed, and produced memos related community safety, early childhood intervention, and social security benefits for children in foster care
- Supported policy attorneys by assisting in the tracking of legislative priorities related to child welfare, behavioral health, early childhood, education, and health care for

COMMUNITY SERVICE

National Juvenile Justice Network **Washington, DC**
Volunteer Sep. 2022 – Dec. 2022

- Conducted research on a variety of juvenile justice issues including state age minimums for the prosecution, detention, and commitment of youth

DC Bar Pro Bono Center–Landlord-Tenant Resource Center **Washington, DC**
Central Intake Volunteer Feb. 2022 – Apr. 2022

- Completed intake screenings of potential clients with landlord and tenant legal issues, provided information to attorneys to help them determine the appropriate services and/or referrals to provide to each potential client

INTERESTS

Reading Judeo-Christian texts, Broadway Theater, finding the best off-leash parks to take my dog to, watching women's basketball

Record of: Isabelle Long
GUID: 817730054

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	93	Legal Process and Society Naomi Mezey	4.00	A-	14.68	
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	B+	19.98	
LAWJ	005	31	Legal Practice: Writing and Analysis Jessica Wherry	2.00	IP	0.00	
LAWJ	009	33	Legal Justice Seminar Philomila Tsoukala	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	46.66	3.59
Cumulative	13.00	13.00	46.66	3.59

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	93	Democracy and Coercion Louis Seidman	5.00	A-	18.35	
LAWJ	005	31	Legal Practice: Writing and Analysis Sherri Lee Keene	4.00	B+	13.32	
LAWJ	007	93	Property in Time Daniel Ernst	4.00	B+	13.32	
LAWJ	008	31	Government Processes Howard Shelanski	4.00	B+	13.32	
LAWJ	611	08	Social Intelligence in the Practice of Law Nadine Chapman	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	18.00	17.00	58.31	3.43
Annual	31.00	30.00	104.97	3.50
Cumulative	31.00	30.00	104.97	3.50

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	126	05	Criminal Law Paul Butler	3.00	A	12.00	
LAWJ	150	07	Employment Discrimination David Simmons	3.00	A	12.00	
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	1724	08	Conservative Legal and Political Thought Seminar Lama Abu-Odeh	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	50.68	3.90
Cumulative	44.00	43.00	155.65	3.62

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
LAWJ	627	4	Development of Lawyering Identity	4.00	A	16.00	
LAWJ	627	81	~Seminar	2.00	A-	7.34	
LAWJ	627	82	~Case & Project Handling	4.00	A-	14.68	
In Progress:							
LAWJ	627	05	Health Justice Alliance Law Clinic			In Progress	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	54.02	3.86
Annual	27.00	27.00	104.70	3.88
Cumulative	58.00	57.00	209.67	3.68

End of Juris Doctor Record

Georgetown Law
Health Justice Alliance Law Clinic
600 New Jersey Ave., N.W.
McDonough Hall, Ste. 340
Washington, DC 20001

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing with pleasure on behalf of Isabelle Long to recommend her highly for a judicial clerkship. Isabelle's exemplary research, writing, and analytical skills, along with her sense of initiative and strong organizational skills, make her particularly well-qualified for a judicial clerkship.

I have known Isabelle since January 2023, when she began her semester as my student in Georgetown Law's Health Justice Alliance Law Clinic. In our Clinic—an intensive, ten-credit, semester-long course—students take on a leadership role as student attorneys. Under the close supervision of our faculty attorney team, students spend, on average, thirty-five hours each week representing low-income clients in poverty law advocacy. Under our supervision, Isabelle represented low-income patients of the Georgetown University Medical Center through our medical-legal partnership, which integrates law students and faculty with healthcare teams to address the social and structural determinants of health and pursue justice through legal advocacy for underserved patients. Isabelle also participated in seminar classes with our clinical faculty team, during which we explored social justice topics, lawyering skills, and a variety of areas of poverty law.

As a clinic student, Isabelle represented a client with limited financial resources to advocate for remediation of harmful housing conditions that were impacting the health of her client's children. Isabelle delved into the applicable housing law and regulations, and her research was thorough and comprehensive. She also conducted an intensive fact investigation in the case and thoughtfully marshalled the facts of the case to analyze her client's potential claims. Isabelle showed an early and impressive mastery of the relevant law and facts, and an ability to analyze different aspects of the case that evidenced close attention to detail and creativity. She drafted and sent a well-written, concise, and impactful letter to the landlord demanding repairs and successfully filed a complaint in the District of Columbia Superior Court to remedy violations of the housing code.

As she was litigating for the first time, Isabelle resourcefully immersed herself in the multiple applicable court rules, administrative orders, and judicial memoranda and skillfully navigated the court process, including properly serving the appropriate parties and obtaining a fee waiver for her client. She also meticulously prepared her oral argument for court. Her solid foundation in the law and facts served her well in her hearing before a magistrate judge in Housing Conditions Court. She delivered complex arguments with clarity and ease, which directly led to a successful outcome for her client.

Isabelle also collaborated with one of the law clinic's healthcare partners to assist the client in having a pet designated as an assistance animal for the client's daughter, who has a disability and requires support from the animal. Isabelle conducted thorough research around multiple federal and District of Columbia laws and regulations connected to disability rights, housing rights, and civil and human rights, to ensure the legal pathway for this designation. She also effectively counseled her client on her right to request a reasonable accommodation to include the assistance animal when applying for a new home.

Furthermore, Isabelle demonstrated a strong sense of initiative and a desire to learn and grow as an attorney. She asked to take on additional casework in order to further develop her lawyering skills during her clinic semester. Isabelle enthusiastically researched entirely new areas of law for that additional casework related to public benefits. She quickly mastered the relevant law and used that knowledge to expeditiously and thoroughly counsel her client and provide the assistance that her client urgently required. Throughout the semester, Isabelle's work evidenced strong organizational skills. She systematically organized the law and the clients' records and maintained meticulous case notes. Her excellent organizational and time management skills allowed her to move her work forward expeditiously.

Moreover, Isabelle impressed me with her ability to reflect insightfully and to bring important and critical perspectives to discussions. Isabelle carries a deep sense of commitment to her growth and work. She approached advocacy, casework, and class assignments with dedication and sincerity.

Isabelle was a pleasure to teach and supervise, and I recommend her with enthusiasm for a judicial clerkship. Her excellent research and writing skills, along with her sense of initiative and organizational skills, will allow her to contribute valuably to your judicial chambers. Please do not hesitate to contact me if I can be of any further assistance to you in making your decision.

Sincerely,

Yael Cannon
Associate Professor

Yael Cannon - yc708@georgetown.edu - 202-661-6729

Director, Health Justice Alliance Law Clinic
(202) 903-4496

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Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 31, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I have served as an Adjunct Professor of Law at the Georgetown University Law Center for more than 25 years. In that time, I have taught literally hundreds of law students, and have had the opportunity to recommend scores of highly qualified law students for judicial clerkships. I write today to recommend to you a highly qualified former student, Isabelle Long, for consideration as a law clerk with your chambers.

Isabelle has all of the indicia of excellence that make her a well-qualified candidate for a judicial clerkship. She has received excellent grades at Georgetown. She currently has a 3.62 GPA, but her grades have improved each year and it is realistic to anticipate that she could graduate with honors from Georgetown. She is the Senior Administrative Editor of our top journal, The Georgetown Law Journal. She graduated magna cum laude from her undergraduate institution, Smith College, and was Phi Beta Kappa. She is an active member of several affinity student organizations. She has (or will soon have) served as a law clerk/student attorney with the Maryland Office of Public Defenders and the Health Justice Alliance Clinic. Also, she was the Research Assistant for one of our most respected faculty member, Professor Louis Michael Seidman.

However, rather than reciting what Isabelle has done, I would like to focus on whom I think she is. I have only known Isabelle since the beginning of the Fall 2022 semester; however, in that short time she distinguished herself sufficiently in my class that I feel comfortable writing a letter supporting her candidacy for a judicial clerkship. Isabelle was a student in my Employment Discrimination class. This was a very small and collegial class and I was able to teach it as a seminar class providing the students extensive opportunities to talk and present arguments in class. Consequently, I had the opportunity not only to observe and evaluate the students' understanding of the materials assigned, legal reasoning skills and their ability to present legal analysis and advocacy; but also to engage often in extended Socratic questioning with the students.

It is my assessment that Isabelle is an extremely bright and thoughtful student. She was always prepared for class and had not only read the materials, but had analyzed and critiqued it to understand how it aligned with the development of jurisprudential principles we have studied earlier in the course, or materials she had learned in other courses. She was extremely well spoken and always maintained a respectful and civil manner toward me and her classmates in our discussions. However, that is not to say that Isabelle was someone who quickly conceded a point when challenged. In fact, some of our most interesting classes were when we had discussions about what Isabelle reasoned to be the "right" and/or "fair" outcome of a case or hypothetical which stood in conflict with the traditional line of reasoning that had developed over time as the foundation for an established doctrine or line of precedents. I recall that when I clerked for the late Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit, Judge Keith encouraged his clerks not only to research and identify existing precedents, but also to examine the foundation underlying those precedents and to discuss with him the applicability of both the letter and the spirit of those precedents to the case at hand. Judge Keith believed that by examining a case in this manner it would ensure that we gave each litigant appearing before the Court a full and fair review of their case. Isabelle Long would most certainly meet Judge Keith's standard of thoroughness.

On a personal level, Isabelle is an interesting and exciting person to be around. She feels deeply, is concerned about what is happening in our world, and is committed to helping to make a better world. While she is a mature and experienced young person, I would describe her as a "Young Soul." By that I mean, she is someone who is excited about life, dedicated to learning new things, and commitment to being a positive asset to our profession and society. Additionally, she is someone who would benefit greatly from meaningful interactions with a jurist who believes in assisting the next generation of leaders in our profession to learn and develop. In return, I am confident that Isabelle will distinguish herself in a judicial Chambers as a very intelligent, thorough, reliable and effective law clerk upon whom a busy jurist can rely.

Based upon the foregoing considerations, I enthusiastically recommend Isabelle Long for a judicial clerkship with your Chambers. If I can provide any further information in support of her candidacy for a clerkship, please feel free to contact me.

Respectfully submitted,

/s/ David C. Simmons

David Simmons - simmondc@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand that Isabelle Long has applied to serve as your law clerk. I know Isabelle well and admire her greatly. I hope that what follows adequately expresses how enthusiastic I am about her application.

Ms. Long is currently enrolled in my Constitutional Law II class and was enrolled last year in a course I teach entitled Democracy and Coercion. I've seen how she performs in a classroom setting, read both her exam and long research essays she has written for me, and had many detailed conversations with her in my office. I know her well and am confident about my assessment of her ability and character.

I will get to those matters in a moment, but first, something about how she got to be the person she is today. Ms. Long was born in China and, at age three, was adopted into an extraordinary family. Her grandfather was Pete Seeger, the famous singer, social activist, and civil rights hero. I mention this because her family background explains a lot about what makes Ms. Long so special. She grew up surrounded by people unwilling to accept hierarchy and injustice. Seeger was an important influence on her life. She learned from him the importance of passionate commitment, dedication to social justice, courage, and very hard work. Those qualities mark everything that she does.

Sometimes, passion outruns ability and deep commitments distort judgment. Ms. Long does not have these problems. She understands that waging the good fight requires analytical precision, careful analysis, and an understanding of why people on the other side might have different views. She is thoughtful, open-minded, and enjoys friendly exchanges with people who disagree with her. Her writing is precise, cogent, and powerful. Her oral advocacy is controlled, succinct, and persuasive.

I hope that you have the chance to meet Ms. Long in person, because you will then see first- hand qualities that I can try to describe but that, really, must be experienced. She radiates infectious enthusiasm and energy that lights up any room that she happens to be in. That's why she has so many friends and supporters. When you see her in action – her willingness to cheerfully do hard work, to stick with a project, and to care for others – you can't help but wish her well.

The short of it, then, is that Ms. Long is destined to make a major impact on the law. In the shorter term, she will be an outstanding law clerk.

If I can provide additional information about Ms. Long's application, please let me know.

Sincerely,

Louis Michael Seidman
Carmack Waterhouse
Professor of Constitutional Law

Louis Seidman - seidman@georgetown.edu

Isabelle Long
Washington DC • (401) 200-1156 • iL172@georgetown.edu

Writing Sample

The attached writing sample is a slightly abbreviated version of a memorandum that I wrote as a student attorney at Georgetown Law's Health Justice Alliance Law Clinic. One of our clients was interested in pursuing an assistance animal accommodation so I researched and drafted a memorandum about applicable federal housing law and applied it to our client's facts. This memo was an internal memo meant for myself and my clinic supervisor. I have omitted my client's name throughout this piece and replaced it with "Client." I have also received permission from my supervising attorneys to use this memorandum as a writing sample.

MEMORANDUM

TO: Lillian Kang, Supervising Attorney

FROM: Isabelle Long, Student Attorney

DATE: April 30, 2023

RE: Client-Assistance Animal

Preface: This memorandum discusses the Fair Housing Act specifically focusing on Assistance Animals. This memo is somewhat untraditional because numerous relevant facts have not been solidified, namely 1) what Client has been officially diagnosed with, 2) what specific symptoms Client has experienced, 3) whether Client's pediatric nurse practitioner will be willing to write an accommodation letter, 4) whether Client will be pursuing an assistance animal accommodation for both of her dogs, Amayah and Carter 5) what specific breed the dogs are, 6) whether the home Client's mother applies for is covered by FHA and 7) whether there is a legal claim at all depending on whether the future landlord refuses to accommodate Client (most likely Client's pediatric nurse practitioner will write a letter on Client's behalf that Client's mother will give to the new landlord). If the landlord accepts the letter, there is no legal issue.

Question Presented

Under Titles VIII and IX of the Civil Rights Act of 1968, known as the Fair Housing Act, does Client's asthma, potential anxiety, and potential post-traumatic stress disorder qualify her for an assistance animal accommodation?

Brief Answer

Yes. Asthma, anxiety, and post-traumatic stress disorder likely qualify as handicaps under the Fair Housing Act, having an assistance animal would allow Client to have an "equal opportunity to use and enjoy" her home, and her request for an accommodation would be reasonable.

Statement of Facts

Client is a 16-year-old girl who resides with her mother and four siblings in Washington DC. Client's mother has reported that Client, in addition to other medical conditions, suffers from asthma, anxiety, and post-traumatic stress disorder (PTSD). Our present fact investigation has confirmed that Client has been diagnosed with asthma, however further investigation will be needed to confirm the latter two disorders. Client's mother also reports that these conditions, particularly in comorbidity together, severely affect Client's physical and mental health. Client's mother is often wary of leaving Client by herself for fear that Client will suffer a panic or asthma attack and be unable to go for help or be able to calm down by herself. Client currently attends REDACTED and receives her primary care there from REDACTED, a pediatric nurse practitioner. From the client's medical records we were able to acquire, she is currently being treated for intermittent asthma.

The family dog, Amayah, has been extremely helpful in supporting Client and provides a lot of emotional support. Additionally, Client's mother reports that Amayah is able to alert other family members when Client is experiencing an asthma or anxiety attack and is able to help soothe Client. Amayah's specific breed is unknown but she appears to be a "bully" breed (commonly referred to as Pit Bulls). Client's mother also reports that Amayah is very friendly

and has no history of aggression. The family also recently acquired a second dog, a puppy named Carter who also appears to be a "bully" breed. Client's mother reports that Carter is similar to Amayah in his ability to provide support to Client. Carter is roughly three months old and also has no history of aggression.

The family resides in a single-family dwelling and pays rent through the Housing Choice Voucher Program (HCVP). The HCVP is a federally funded program that allows recipients to rent homes on the private market. The family has been living in their current home for the past four and half years but has been consistently dealing with serious housing conditions issues. Because of these issues, the family is looking to move as soon as possible. The family's current landlord allows the dogs to live in the home, however, the family is worried that their future landlord will not allow the dogs to move with them, despite the emotional support they provide to Client.

Discussion

Titles VIII and IX of the Civil Rights Act of 1968, known as the Fair Housing Act (FHA) prohibits various forms of housing discrimination including making it unlawful for someone "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. 3604(f)(1). While the FHA applies to "virtually all types of housing" there are two main types of housing that are not covered. FHEO Notice: FHEO-2020-01. Firstly, the FHA does not apply to owners who own three or fewer single-family homes so long as the owner also does not 1) use a real estate broker nor 2) use discriminatory advertising. 42 U.S.C. 3603(b)(1). Secondly, the FHA does not apply to buildings with four units or less and in which the owner lives in one of the units. 42 U.S.C. 3603(b)(2). At

this time the family has not identified nor applied to a new home, however, it is nearly certain that when the family does move to a new home it will be covered by the FHA. *See* HUD-1686-1-FHEO 2011.

Assuming that the family does move to a new home covered by the FHA, they will have a legal claim that Amayah is an Assistance Animal (AA). AAs are "animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities" and can be reasonable accommodations under the FHA. FHEO Notice: FHEO-2020-01. Consequently, if the new landlord refuses to allow Amayah in the home, the family could bring a failure to reasonably accommodate claim. 42 U.S.C. 3604(f)(3)(B). In order to bring an accommodation claim the family must prove that: Client has 1) a handicap defined under 42 U.S.C. 3602(h), 2) the landlord knew or reasonably should have known of the Client's disability, 3) having Amayah enables Client to have an "equal opportunity to use and enjoy" the home, 4) allowing Amayah in the home is reasonable, and 5) that the landlord refused to accommodate Client. *See Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798, 805 (E.D. Cal. 2016); *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1129 (D.C. App. 2005).

1. **Client likely has multiple "handicaps" as defined under 42 U.S.C. 3602(h).**

Under the FHA a handicap is defined as "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. 3602(h)(1). The Code of Federal Regulations ("the Code") provides further guidance on what constitutes a "physical or mental impairment" and what constitutes "major life activities." The Code states that a "physical or mental impairment" includes physiological conditions affecting the respiratory system, as well as psychological disorders, including mental illnesses. 24 C.F.R. §

100.201. Asthma is classified as a physiological condition. B. Sinyor & L. Concepcion Perez *Pathophysiology of Asthma* (2022); *see also Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994). Anxiety and PTSD are classified as mental illnesses. 5th ed.; DSM–5; American Psychiatric Association, 2013. Consequently, Client has three "physical and mental impairments" under the FHA's definitions.

However these impairments must also "substantially limit[] one or more of … [her] major life activities." The Code defines "major life activities" to include, but are not limited to, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. § 100.201; *see also U.S. v. S. Mgt. Corp.,* 955 F.2d 914 (4th Cir. 1992) (finding a home is a major life activity); *Rodriguez v. Village Green Realty, Inc.,* 788 F.3d 31 (2d Cir. 2015) (same).

While further fact investigation is needed to confirm that Client has been diagnosed with anxiety and PTSD, assuming that Client has been officially diagnosed it is very likely that Client will be considered "handicap." The FHA's definition of handicap is essentially identical to the Americans with Disabilities Act's definition of "disability" as amended by the 2008 amendment. *See* 42 U.S.C. 12102. This shared definition implies that the broad and inclusive approach adopted by the ADA as amended (*See* 29 C.F.R. § 1630.1) should also extend to the construction of "handicap" under the FHA as both acts serve the same purpose of eliminating discrimination and ensuring equal access to various areas of life for individuals with disabilities. Under the ADA's definition of disability, asthma, anxiety, and PTSD have all been determined to qualify as disabilities. *See Brown v. Georgia Dept. of Corrections,* 2008 WL 795086 (M.D.Ga., 2008) ("Courts have recognized that serious asthma can render an individual as disabled pursuant to the ADA."); *Huiner v. Arlington School Dist.*, 2013 WL 5424962 (D.S.D., 2013) (finding plaintiff's

anxiety qualified as a disability under the ADA); 29 CFR § 1630.2(j)(3)(iii) (PTSD is *per se* a disability).

Therefore, assuming Client has been diagnosed with anxiety and PTSD and her mother's report of the severity of her symptoms is accurate, it is probable that Client is considered handicap under the FHA.

2. Client or Client's mother will need to provide oral or written notice of an accommodation request to the Landlord.

In order to request an accommodation based on an individual's handicap, notice must be provided to the landlord. Notice to a landlord requesting an accommodation may be done orally or in writing, however, writing is preferred.FHEO Notice: FHEO-2020-01. And in the case of a minor who is in need of an accommodation the request can be made by a legal guardian. FHEO Notice: FHEO-2020-01. While there are not any specific requirements of what the notice must contain, the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) recommend that the individual "make[] clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. She should explain what type of accommodation she is requesting and… explain the relationship between the requested accommodation and her disability." *Reasonable Accommodations under the Fair Housing Act* (May 17, 2004).

If the handicap is not visible, it is recommended that the individual provide "documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability." FHEO Notice: FHEO-2013-01. In Client's case, all three

possible conditions are not visible and thus she should provide documentation from her nurse practitioner. Medical letters stating that an animal provides emotional support, alleviating the symptoms or effects of a disability are quite common. Many organizations have made sample emotional support letters available for reference. *See, e.g.*, https://www.hud.gov/sites/documents/DOC_7399.doc and https://legal.as.ucsb.edu/2020/09/17/sample-esa-letter-for-health-care-professional/. Importantly a landlord may not ask for "extensive information or documentation of a person's physical or mental impairments" FHEO Notice: FHEO-2013-01. Therefore the accommodation letter can be brief and is typically only one page long.

3. **With Amayah as an assistance animal, Client will have an equal opportunity to use and enjoy her home.**

FHEO notices, the Code, and several courts have addressed what an "equal opportunity to use and enjoy" the home constitutes. Firstly, and most importantly, according to FHEO Notice: FHEO-2020-01 issued in January of 2020, the FHA covers support animals (assistance animals) as well as service animals. The notice defines AAs as animals that provide "therapeutic emotional support for individuals with disabilities" and/or "provide emotional support to alleviate a symptom of effect of a Disability." Notice: FHEO-2020-01. Implicit in this clarification that AAs are covered under FHA, is the presumption that emotional support from an animal may be necessary for an individual to have an "equal opportunity to use and enjoy" their home.

Secondly, the Code provides two examples of situations in which an individual would be denied "equal opportunity to use and enjoy" their home without a reasonable accommodation. 24 CFR § 100.204. The first situation described is one in which a blind individual requests an

accommodation to live in a home with a seeing-eye service dog. 24 CFR § 100.204(b). The Code does not elaborate on why a seeing eye service dog would be necessary for a blind individual to have an "equal opportunity to use and enjoy" their home; however, presumably, this is because, in part, the dog would allow the individual to live more independently. The second example is one in which a mobility-impaired person requests a parking spot close to his apartment. 24 CFR § 100.204(b). For this example, the Code explains that without this accommodation the individual may be unable to live in the apartment building at all, or would have "great difficulty getting from his car to his apartment." 24 CFR § 100.204(b). Both examples imply that an "equal opportunity to use and enjoy" one's home involves an element of independence for the individual.

Thirdly, various court cases have also addressed whether emotional support from animals provides individuals an "equal opportunity to use and enjoy" their home. Generally, courts have found that an assistance animal accommodation is necessary for an individual to have an "equal opportunity to use and enjoy" the home if the individual 1) demonstrates an emotional and psychological dependence on the animal, Crossroads Apartments Associates v. LeBoo, 578 N.Y.S.2d 1004, 1007 (N.Y. City Ct. 1991), and 2) shows that the animal "affirmatively enhance[s]... [their] quality of life by ameliorating the effects of the disability." Castellano v. Access Premier Realty, Inc., 181 F. Supp. 3d 798, 806 (E.D. Cal. 2016); see also Howard v. City of Beavercreek, 276 F.3d 802, 806 (6th Cir. 2002) (same).

Courts have found that these two elements have been satisfied by medical documentation. For instance in Bhogaita v. Altamonte Heights Condo. Association, Inc. the court found that a doctor's letter explaining that the dog helped the individual "cop[e] with his disability and ameliorate[d] [his] psychiatric symptoms" and "without the dog, [his] social interactions would

be so overwhelming that he would be unable to perform work of any kind" was sufficient. 765 F.3d 1277, 1289 (11th Cir. 2014). Likewise in Whittier Terrace Associates v. Hampshire, the court found that medical documentation stating that there was a "relationship between the defendant's ability to function and the companionship of the cat" was sufficient to show that the cat allowed the individual to have an "equal opportunity to use and enjoy" his home. See also The Sec., U.S. Dept. of Hous. and Urb. Dev., on Behalf of Durand Evan, Charging Party, Durand Evan, Intervenor, HUDALJ 09-93-1753-8, 1996 WL 657690 (Nov. 12, 1996) (held that letters from the complaint's doctors stating that his cat was therapeutic for him was sufficient to establish that the cat enabled the complainant to use and enjoy his home). Overall, in the context of assistance animals, the relevant case law indicates that letters from medical professionals explaining the need for an assistance animal are satisfactory to establish that the animal allows an individual an "equal opportunity to use and enjoy" their home.

Amayah's presence will allow Client to have an "equal opportunity to use and enjoy" her home. Amayah's presence will allow Client to remain at home alone, or at home without her mother, thereby allowing Client to live more independently and take full advantage of her home. Also while more fact investigation may be needed in regard to how exactly Amayah supports Client, from Client's mother's account, Amayah does provide therapeutic emotional support for Client, and Client, in turn, has an emotional dependence on her. Further, it appears that Amayah's presence may alleviate Client's anxiety and PTSD symptoms by reducing Client's stress. Client's claim will also be strengthened by a letter from her nurse practitioner, a document many courts find very persuasive to establish the need for an assistance animal.

4. Allowing Amayah in the home is reasonable.

In determining whether accommodating an assistance animal is reasonable, three factors are typically considered. Specifically, a landlord is not required to accommodate the animal if doing so would 1) "require[] a fundamental[] alter[ation] [of] the nature of the landlord's operations," 2) imposes an undue financial and administrative burden on the landlord, or 3) imposes a direct threat. FHEO Notice: FHEO-2020-01; Reasonable Accommodations under the Fair Housing Act (May 17, 2004). Importantly, determinations regarding financial and administrative burdens are done on a case-by-case basis. Reasonable Accommodations under the Fair Housing Act (May 17, 2004).

However, regarding dog assistance animals and the like, allowing the animal to live in the dwelling is per se reasonable. FHEO Notice: FHEO-2020-01 (same for a "cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes"). Additionally, a landlord can not arbitrarily restrict which animals qualify as assistance animals based on breed or size. FHEO Notice: FHEO-2020-01; see Warren v. Delvista Towers Condo. Ass'n, Inc., 49 F. Supp. 3d 1082 (S.D. Fla. 2014) (FHA preempted local ordinance banning pit bulls). Therefore any legal argument arguing that accommodating Amayah would impose undue burdens or require alternations of the landlord's operations would be unsuccessful.

Nevertheless, it is possible that a future landlord may argue that Amayah poses a direct threat because of her breed, however, this argument would also likely be unsuccessful. An animal may pose a direct threat if the pet has a history of dangerous behavior or would likely cause substantial damage to the home. Fed. Reg. Vol. 73, No. 208. Notably, the threat can not be

speculative or reliant on fears based on stereotypes of certain breeds. FHEO Notice: FHEO-2013-01 Instead the threat analysis must be individualized and based on the "specific animal's actual conduct." FHEO Notice: FHEO-2013-01. Client's mother reports that Amayah has no history of aggression and from our fact investigation, including home visits, Amayah has caused no damage to Client's current home. Therefore because 1) dog assistance animals are per se reasonable, 2) accommodating a dog in a home would not require a fundamental alteration of the landlord's operations, and 3) Amayah poses no direct threat to the safety or wellbeing of others, accommodating Amayah is a reasonable accommodation.

5. **The possibility of two AAs is a potential issue that the landlord may raise, however, such a claim will likely be unsuccessful.**

While it is unlikely that with a medical professional's note indicating that Client would benefit from an AA, a landlord would contest that Client is "handicapped" under the FHA, it is possible that the landlord may argue that accommodating two AAs is not reasonable. However, the text of the FHA does not stipulate that an individual may only have one AA. Further FHEO-2020-01 explicitly addresses the issue of multiple AAs and acknowledges that while typically reasonable accommodation requests only involve accommodating one animal, requests may "involve more than one animal (for example, a person has a disability-related need for both animals or two people living together each have a disability-related need for a separate assistance animal)." Thus even accommodation requests for two AAs are not *per se* unreasonable.

Conclusion

With confirmation that Client has been diagnosed with anxiety and PTSD, in addition to asthma, Amayah has never been violent, and a letter from Client's nurse practitioner, the family has a strong claim that Amayah is an assistance animal under the FHA. Assuming Client has been diagnosed with asthma, anxiety, and PTSD, 1) she has a handicap, 2) assuming Client provides a letter to her future landlord, the landlord will know that Client has a handicap, 3) Client's letter from her nurse practitioner will establish that Amayah enables Client to have an "equal opportunity to use and enjoy" the home and 4) allowing Amayah in the home is reasonable.

Applicant Details

First Name	**Glenn**
Last Name	**Lutzky**
Citizenship Status	**U. S. Citizen**
Email Address	**glenn.lutzky@live.law.cuny.edu**
Address	**Address** **Street** **116 E 117th St Apt 2S** **City** **New York** **State/Territory** **New York** **Zip** **10035** **Country** **United States**
Contact Phone Number	**9149603250**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2012**
JD/LLB From	**City University of New York School of Law** **http://www.law.cuny.edu**
Date of JD/LLB	**May 12, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**City University of New York Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Twenty-Sixth Annual CUNY Moot Court Summer Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy, Immigration**

Recommenders

Zalesne, Deborah
Zalesne@law.cuny.edu
_718_ 340-4328

Aggrey, Risa
raggrey@nycourts.gov
(646) 696-4314

Capulong, Eduardo R. C.
eduardo.capulong@law.cuny.edu
718-340-4607

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Glenn Lutzky
116 East 117th Street, Apt. 2S
New York, NY 10035

May 29, 2023

Honorable Juan R. Sánchez
Chief Judge
United States District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez:

I am writing to apply for the 2024–2025 term clerkship in your chambers. I am a 2023 graduate of the City University of New York School of Law and was the co-Managing Articles Editor for the *City University of New York Law Review*. Through overseeing half of the journal's print pieces, authoring two notes, and my upcoming clerkship, I am developing critical analysis, writing, legal research, and collaboration skills that would benefit this position. Moreover, I would look forward to clerking for a judge who has dedicated his career to public service.

I would bring to the clerkship a broad array of experiences in legal work; before law school, I volunteered at a pro se asylum legal clinic and worked as a bankruptcy paralegal at a small firm. My clerkship, beginning in August, with a New Jersey Superior Court judge will further elevate my skills in researching various areas of the law, as well as writing draft decisions and bench memoranda. My academic year internship with a New York State judge allowed me to write many draft decisions and learn about court procedures. Further, my judicial writing course taught by an active judge included modules on topics such as writing statements of the facts and draft decisions, citing to the record, using varied language, and writing in a judge's voice.

In addition to my internships, I wrote a paper for an independent study about how judges across the country have interpreted leases in disputes where commercial tenants did not pay rent due to COVID-19. The paper allowed me to research recent and historical court decisions and review case filings. I am delighted to share that the Saint Louis University Law Journal has published it. This summer, the CUNY International Law Journal will also publish my paper on lessons learned from Chile's recent constitutional convention and plebiscite.

I am confident I would be an asset to your chambers; my various experiences in law have helped me cultivate my skill set. Additionally, I believe my attention to detail and collaborative attitude would serve this clerkship well. Thank you very kindly for your consideration. I am available at your convenience for an interview. Please contact me at (914) 960-3250 or glenn.lutzky@live.law.cuny.edu if you need any additional information.

Respectfully,

Glenn Lutzky

GLENN LUTZKY

116 EAST 117TH STREET, APT. 2S, NEW YORK, NY 10035 ● (914) 960-3250 ● GLENN.LUTZKY@LIVE.LAW.CUNY.EDU

EDUCATION

CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW
Juris Doctor, May 2023 | GPA: 3.825

Activities: CUNY Law Review, Managing Articles Editor (2022–2023), Staff Editor, (2021–2022); CUNY Moot Court, Member; CUNY OUTLaws, Member; New York City Bar Association Compliance Committee, Student Member (2021–2022); First-Year Lawyering Seminar (Legal Writing Class) & Writing Center Bluebook Citation Assistant (2022–2023); Lawyering Seminar Writing Mentor; Scribes-American Society of Legal Writers, Student-Editor Member

Honors: CUNY Moot Court Summer Competition, Summer 2021, Best Brief Third Place Award; The New York Bar Foundation, Catalyst Public Service Fellow, Summer 2021

BROWN UNIVERSITY
Bachelor of Arts (International Relations), May 2012

Activities: Study Abroad Program in Salamanca, Spain, Spring 2011; Photo Editor and Photographer, Brown Daily Herald

EXPERIENCE

Judge Haekyoung Suh, New Jersey Superior Court, *Prospective Law Clerk* August 2023 – August 2024
Expected roles are writing bench memoranda and draft orders and opinions, interacting with counsel and self-represented litigants, communicating with the public, conducting mediations, assisting with case management, and managing the motion calendar.

Mediation Clinic, Main Street Legal Services, Inc., *Student Attorney* August 2022 – December 2022
Under attorney supervision, mediated Equal Employment Opportunity Commission and Small Claims matters.

New York State Office of the Attorney General, Westchester Regional Office
Summer Legal Intern Summer 2022
Assisted attorneys in defensive matters. Drafted motions. Wrote memoranda of law in preparation for trials and wrote claim settlement recommendations. Attended trials, court hearings, and depositions.

Justice Lisa S. Headley, Supreme Court of New York, *Judicial Intern* September 2021 – April 2022
Wrote draft decisions on motions (summary judgment, dismissal, default, consolidation/joinder). Researched procedural, evidentiary, and jurisdictional issues.

Catholic Charities Immigration Special Projects, *Summer Legal Intern* Summer 2021
Prepared asylum declarations, applications, briefs, and annotated tables of contents. Researched country conditions for asylum cases. Analyzed changes in asylum case law and policies. Interviewed clients.

Congregation Beit Simchat Torah, *Pro Se Asylum Legal Clinic Volunteer* April 2019 – July 2020
Assisted clients with asylum applications. Drafted affidavits and compiled supporting documents.

Jayson Lutzky, P.C., *Bankruptcy Paralegal* November 2016 – July 2020
Conducted intake interviews. Reviewed financial documents. Prepared petitions and e-filed petitions using CM/ECF. Interacted with trustees. Prepared subpoenas and orders to show cause for matrimonial cases.
Director of Marketing June 2012 – November 2016
Launched law firm website. Wrote and edited blogs, newsletters, landing pages, and e-books.

PUBLICATIONS: Glenn Lutzky, Note, *Lather, Rinse, Repeat: Lessons Learned from Chile's 2022 Constitutional Plebiscite*, 2 CUNY INT'L L.J. (forthcoming Aug. 2023).

Glenn Lutzky, Note, *COVID and Consequences: How the Pandemic Changed Contract Interpretation and Litigation*, 67 ST. LOUIS U. L.J. 167 (2022).

LANGUAGES: Spanish (proficient), French (conversant)

INTERESTS: Digital Photography, Adventure Travel, Classical and Pop Music, Piano

Law Student Copy Academic Record

Name: Glenn Lutzky
Student ID: 13003240

Birthdate: 02/23
Student Address: 116 E 117th St Apt 2S
New York, NY 10035-4667
Print Date: 06/07/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/29/2020: Active in Program
06/29/2020: Law JD Major

---------- **Beginning of Law Record** ----------

2020 Fall Term

Course	Description	Earn	Grd
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		
Course Attributes:	ZERO Textbook Cost		

Academic Standing Effective 03/13/2021: Good Academic Standing

2021 Spring Term

Course	Description	Earn	Grd
LAW 702	Contracts: LME II	3.00	A-
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	B
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A-
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	A
Contact Hours:	2.00		

2021 Fall Term

Course	Description	Earn	Grd
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
LAW 7192	Constitutional Structures	3.00	A
Contact Hours:	3.00		
Course Attributes:	Low Textbook Cost		
LAW 7292	Evidence-L&Pub Int 1	4.00	A-
Contact Hours:	4.00		
LAW 7726	Topics In Law	2.00	A-
Course Topic:	Writing for the Court		
Contact Hours:	2.00		

2022 Spring Term

Course	Description	Earn	Grd
LAW 738	Professional Responsibility	2.00	A-
Contact Hours:	2.00		
LAW 772	Independent Study	3.00	A
Contact Hours:	3.00		
LAW 780	Criminal Procedure: Investigat	3.00	A
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	A
Course Topic:	COMM & ECON DEVELPMT		
Contact Hours:	4.00		
Course Attributes:	Low Textbook Cost		
LAW 7251	Public Institutions/Admin Law	3.00	B+
Contact Hours:	3.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Fall Term

Course	Description	Earn	Grd
LAW 7572	Business Associations	3.00	A
Contact Hours:	3.00		
LAW 7751	Mediation Clinic	12.00	A
Contact Hours:	12.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

Course	Description	Earn	Grd
LAW 751	Wills and Trusts	3.00	A
Contact Hours:	3.00		
LAW 774	Human Rights Law	2.00	A
Contact Hours:	2.00		
LAW 785	Employment Law	3.00	A
Contact Hours:	3.00		
LAW 804	Law Review Editing	3.00	CR
Contact Hours:	3.00		
LAW 7261	Federal Courts	3.00	A
Contact Hours:	3.00		

Degrees Awarded

Degree: Juris Doctor
Confer Date: 06/06/2023
Plan: Law

End of Law Student Copy Academic Record

Glenn Lutzky

2020 Fall Term > Law > School of Law

Class Grades - 2020 Fall Term

Class	Description	Units	Grading	Grade	Grade Points
LAW 701	Contract Law Market Economy I	3.00	Graduate Letter Grades	**A-**	11.100
LAW 705	Legal Research	2.00	Graduate Letter Grades	**A**	8.000
LAW 7004	Lawyering Seminar I	4.00	Graduate Letter Grades	**A-**	14.800
LAW 7043	Liberty Equality & Due Process	3.00	Graduate Letter Grades	**B+**	9.900
LAW 7131	Crim L-Rsp Inj Condu	3.00	Graduate Letter Grades	**A-**	11.100

Term Statistics - 2020 Fall Term

	From Enrollment		Cumulative Total
Units Toward GPA:			
Taken	15.000		15.000
Passed	15.000		15.000
Units Not for GPA:			
Taken			
Passed			
GPA Calculation			
Total Grade Points	54.900		54.900
/ Units Taken Toward GPA	15.000		15.000
= GPA	**3.660**		**3.660**

Academic Standing Good Academic Standing

Return to View My Grades

TRANSCRIPT EXPLANATION

ACCREDITATION
CUNY School of Law is accredited by the American Bar Association (ABA) and is a member of the Association of American Law Schools (AALS).

FOR STUDENTS WHO ENTERED THE LAW SCHOOL PRIOR TO FALL 1996
The following grading system was in effect:
P (Pass)
F (Fail)

FROM FALL 1996 – SUMMER 1999
The following grading system was in effect:

P+ (Pass Plus), P (Pass), P- (Pass Minus), F (Fail)

- Grades for all first-year courses taken in the first year were recorded on the transcript as **P** or **F**;
- The grades of **CR** and **F** were the only grades for the courses Individual Skills Development and Legal Methods;
- The grades of **CR** or **F** appear on the transcript for those electives (up to a total of four) for which student has chosen the **CR/F** option.

AS OF FALL 1999
Beginning Fall Semester of 1999, the following grading system is in effect for all students:

A, A-, B+, B, B-, C+, C, C-, D, F

- The grades of **CR** (**Credit**) and **NC** (**No Credit**) are recorded on the transcript for all first-year, first-semester students;
- The grades of **CR** and **F** are the only grades for the following courses:

  Civil Process & Professional Responsibility, Individual Skills Development, Law Review, Legal Methods, Legal Process, Moot Court;
- The grades of **CR** or **F** appear on the transcript for those electives (up to a total of four) for which the student has chosen the **CR/F** option.

EFFECTIVE SPRING 2012

The grades of **CR** or **NCL** appear on the transcript for those electives (up to a total of four) for which the student has chosen the CR/NCL option. Successful completion of such courses is indicated by a grade of CR. Unsuccessful completion is indicated by a grade of NCL.

OTHER TRANSCRIPT ABBREVIATIONS AND SYMBOLS

AUD	(Audited Course)
INC	(Incomplete)
FIN	(F grade from an Incomplete)
PEN	(Grade Pending)
W	(Official Withdrawal)
WA	(Administrative Withdrawal)
WN	(Never Attended)
WU	(Unofficial Withdrawal)
Z	(No grade submitted by instructor)

All Spring/Fall 2020 grades were earned during a major disruption to instruction as a result of the COVID-19 pandemic.

CUNY School of Law does not rank its students nor does it provide grade point averages.
Questions about the Law School's grading system should be directed to the Office of Academic Affairs (718) 340-4370.

The Family Education Rights and Privacy Act (FERPA) of 1974, as amended, prohibits release of this record to a third party without the written consent of the student.

The City University of New York
CUNY SCHOOL OF LAW
Law in the Service of Human Needs

Office of Registration & Student Records Management
2 Court Square
Long Island, New York 11101
Tel. 718-340-4237 / Fax 718-340-4234

May 29, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to write a letter recommending Glenn Lutzky for a federal clerkship. Mr. Lutzky was a student in my Contracts I and II classes during his first two semesters of law school last year so I got to know him quite well, even though class was completely remote at that time. This year I've gotten to evaluate his work in closer detail, as I supervised a directed research project he did.

Based on these interactions, I can say definitively that Mr. Lutzky is a serious student with excellent legal reasoning and writing skills. He reads cases with attention to detail and uses them effectively to make persuasive legal arguments. He is a highly-structured thinker and passionate about CUNY Law's public service values. He excelled in Contracts both in terms of his final grades and in his engagement and class participation, where he consistently elevated the level of class discussions by challenging assumptions and raising important issues in a thoughtful way.

I got to know Mr. Lutzky better this year while supervising his independent study about how force majeure clauses in contracts have been interpreted in light of COVID and the unforeseeable pandemic. Mr. Lutzky took the initiative to start work on this paper even before formally starting the independent study, because it is a topic that interested him during his time in my Contracts class. His research was extremely thorough and organized, his writing style is persuasive, and overall his work was thoughtful, critical, and professional. Substantively, he has some really interesting ideas that I will incorporate into my own teaching of the relevant topics. His paper is already of publishable quality, and because it is so timely, I am confident he will be able to place it with a very good journal.

In sum, I am confident Mr. Lutzky will continue to distinguish himself in whatever endeavors he undertakes. I recommend him without hesitation. If you would like additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

Deborah Zalesne - Deborah.Zalesne@law.cuny.edu - (718) 340-4328

Risa Aggrey, Esq.
Supreme Court of New York
80 Centre Street
New York, NY 10007
raggrey@nycourts.gov
(646) 696-4314

June 17, 2022

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter of recommendation for Glenn Lutzky. Glenn worked directly with me as a judicial intern beginning in the fall of 2021, and I actually offered him an extension through the spring of 2022. I believe my offer to extend his internship is a testament to his quality work ethic and work product. The nature of Glenn's internship was virtual, and his primary role was to draft written decisions on motions submitted to the chambers of the Hon. Lisa S. Headley. I am Judge Headley's principal law clerk, and I was the direct supervisor of Glenn. I assigned him decisions to draft for the court, and I also reviewed and finalized all of his work product.

Glenn's primary responsibilities included reviewing and drafting decisions on motions submitted to the court. Glenn was assigned to draft decisions on several types of motions, including, but not limited to, summary judgment motions, motions to amend the pleadings, and motions to consolidate. Glenn's work required him to perform legal research on Westlaw or Lexis Nexis. Also, Glenn mastered navigating the New York State Courts Electronic Filing website, where all the court cases are electronically filed. Glenn and I had several meetings via Microsoft Teams to review and provide feedback on his decision drafts. I can attest that during my meetings with him, he was very professional and attentive to the feedback of his written work. I have noticed that since his first assignment at the beginning of his internship through his final written product, there was much improvement in his legal writing. Glenn is very thorough and demonstrated his analytical skills through his written product as well as during our conversations and e-mail communications. Specifically, Glenn submitted detailed questions and/or comments to cases in which he was assigned, which demonstrated his understanding and critical analysis of the motion papers.

It was my pleasure to work with Glenn in this unique and virtual capacity. I submit this letter of recommendation without hesitation. I believe Glenn has the skills and abilities to succeed as a Staff Attorney.

Please feel free to contact me if you require additional information.

Sincerely,

Risa Aggrey, Esq.
Principal Court Attorney to Hon. Lisa S. Headley

May 29, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Glenn Lutzky is, in my opinion, particularly suited to the work of the judicial clerk. Skilled in legal analysis and writing, I've no doubt he will be an asset to your chambers.

Glenn was my Lawyering seminar student in the Spring of 2021. At CUNY Law, we require three semesters of Lawyering, two in the first year and one in the second. The Lawyering Program, which I direct, is our students' introduction to the school's experiential program. Among other skills, we teach legal analysis and writing, fact-development, and oral advocacy. In the first semester (Lawyering Seminar I), students concentrate on predictive writing and draft an interoffice memorandum of law; in the second (Lawyering Seminar II), they concentrate on persuasive writing and draft a brief.

Glenn was a student in my Lawyering Seminar II class. For that class, students wrote a brief involving a New York State family law statute prescribing parents' minimum duty of care to supervise their children. In his brief, Glenn demonstrated a nuanced understanding of the statute and controlling cases, how these authorities applied to the set of facts, and the likely outcome of such application. Second-semester law students are, of course, still novices in this basic lawyering chore. But Glenn exhibited a firm grasp of it and an ease in working with the legal method. In addition, it was a pleasure discussing the case during our individual feedback meetings: Glenn dissected the finer points of the doctrine, showed great interest in the nuances of legal language, and displayed admirable sensitivity to the parties involved (simulated as they were). In a word, Glenn was a joy to work with.

I recommend him highly to your chambers.

Very truly yours,

Eduardo R.C. Capulong
Former Interim Dean, Professor of Law, and Director,
Lawyering Program

Eduardo R. C. Capulong - eduardo.capulong@law.cuny.edu - 718-340-4607

Glenn Lutzky

Writing Sample Introduction

This writing sample is an excerpt from the paper I wrote for my Spring 2022 independent study. The paper analyzes how courts have interpreted language in leases after landlords sued commercial tenants who did not pay rent due to COVID-19 restrictions that affected their businesses. The paper allowed me to explore many federal and state decisions from trial and appellate courts across the country. I also reviewed court filings.

The paper is unedited to the extent that I received guidance from my professor in refining the topic. I also received very general feedback on the first few pages of the paper early in the writing process, some assistance in crafting doctrinal definitions, and was encouraged to bolster certain transitions.

I have omitted sections from the paper as indicated. Also, I have omitted several case discussions and shortened the section containing my recommendations. The cases I chose to keep in the sample interact well with each other, offering contrasting results based on similar facts. I can provide the full paper upon request.

Glenn Lutzky Writing Sample

COVID AND CONSEQUENCES: HOW THE PANDEMIC CHANGED CONTRACT INTERPRETATION AND LITIGATION

INTRODUCTION

At the beginning of the COVID-19 pandemic, governors ordered many nonessential businesses to temporarily close or operate at a reduced capacity to mitigate the public health threat posed by COVID-19.[1] Consequently, those businesses suffered revenue shortfalls,[2] and some could not maintain contractual obligations, such as paying rent.[3] Initial advisory memos written by law firms interpreting force majeure clauses did not encourage clients to breach their contracts by stopping rent payments, based on the expectation that courts would not excuse their performance.[4] However, courts have taken various and sometimes contradictory approaches to excusing performance.[5] In general, courts only excuse performance if parties have contracted for a specific and unambiguous situation in advance that explicitly excuses performance.[6] Courts

[1] *See, e.g.*, N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.8.pdf; Ill. Exec. Order No. 2020-10 (Mar. 20, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf.
[2] *See* ALEXANDER W. BARTIK ET AL., HOW ARE SMALL BUSINESSES ADJUSTING TO COVID-19? EARLY EVIDENCE FROM A SURVEY - NBER WORKING PAPER NO. 26989, at 9-10 (2020), https://www.nber.org/system/files/working_papers/w26989/w26989.pdf (noting that many small businesses did not have sufficient cash on hand to maintain operations during the early part of the pandemic); DELOITTE, COVID-19: MANAGING CASH FLOW DURING A PERIOD OF CRISIS 2 (2020), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-COVID-19-managing-cash-flow-in-crisis.pdf (highlighting low cash reserves and unstable cash flows in a wide variety of industries and business sizes at the onset of the pandemic).
[3] *See* Konrad Putzier & Esther Fung, *Businesses Can't Pay Rent. That's a Threat to the $3 Trillion Commercial Mortgage* Market, WALL ST. J. (Mar. 24, 2020, 8:00 AM), https://www.wsj.com/articles/businesses-cant-pay-rent-thats-a-threat-to-the-3-trillion-commercial-mortgage-market-11585051201; *see also The Effect of Government Stimulus on Commercial Real Estate amid COVID-19*, MCKINSEY & CO. (Jan. 20, 2021) (discussing the effects of government stimulus packages on businesses and commercial properties).
[4] Stanford Law School has compiled a searchable database of more than 4,000 memoranda prepared by law firms, audit firms, and other business advisors related to COVID-19 topics. Press Release, Stan. L. Sch., Stanford Law School Launches COVID-19 Memo Database in Collaboration with Cornerstone Research (Apr. 15, 2020), https://law.stanford.edu/press/stanford-law-school-launches-covid-19-memo-database-in-collaboration-with-cornerstone-research/.
[5] *See* discussion *infra* Part III.
[6] *See* discussion *infra* Part III.

seldom accept post hoc theories and arguments that seek to redefine parties' intentions and obligations at the time of contracting.[7] In upholding contracts as written, courts rarely grant parties a windfall.[8]

This paper begins with an overview of the current doctrines of force majeure, impracticability and impossibility, and frustration of purpose. It then studies the types of language used in contracts that allocate risk—foreseen and unforeseen—and how that language affects a court's decision when one party sues seeking relief due to another party's nonperformance. Specifically, it first examines how courts have interpreted force majeure clauses in commercial leases, especially in businesses where governmental restrictions required them to operate at reduced capacity. Second, it examines how courts have interpreted commercial leases where the purpose of the lease is specified. Third, the article examines how courts interpreted leases of businesses that sold alcohol in the early twentieth century when counties, states, and, later, the nation banned alcohol production and sale. As far as reasoning goes, courts are exceptionally hesitant to reallocate risk between sophisticated parties and generally find that financial difficulty is not enough to excuse performance.[9] Finally this article concludes with guidance for drafting contracts based on courts' current semantic interpretations.

I. THE COVID-19 PANDEMIC

[omitted]

II. CURRENT DOCTRINE

A. Force Majeure Clauses

[7] *See* discussion *infra* Part III.
[8] *See* discussion *infra* Part III.
[9] *See generally* Swata Gandhi, *Force Majeure and Contracting Strategies for the COVID-19 Era*, PRAC. LAW., Aug. 2021, at 55, 55.